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IN THE

Supreme Court of the United States

OCTOBER TERM—1969

No. ~~570~~ 42

BURNS AND ROE, INC., and
WHITE CONSTRUCTION COMPANY,

Petitioners,

vs.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States Supreme Court and the Associate Justices of the United States Supreme Court:

Intervenors-Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 29, 1969.

The Opinions Below

The N.L.R.B. Trial Examiner's decision was made September 28, 1966. (See Appendix A). The National Labor Relations Board's decision and order was made on February 13, 1967 (see Appendix B) which is reported at 162 NLRB 1617. The Court of Appeals filed its opinion on April 25, 1969 (see Appendix C). The Opinion of the Court of Appeals for the Third Circuit (No. 17180) is reported at 410 F. 2d 5.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was made and entered on May 29, 1969. (Appendix D).

An order of the Court of Appeals for the Third Circuit denying the Petition of the N.L.R.B. for a rehearing was made and entered on June 12, 1969. (Appendices E & F).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

Question Presented

The National Labor Relations Board found that Respondent engaged in unlawful work stoppages on October 1 and October 7, 1965 at Intervenor-Petitioners' 68 million dollar nuclear power generator construction project. It further found that Respondent's strike threats and strikes were in furtherance of a primary dispute between Respondent and Intervenor-Petitioner White Construction Company which company refused to reassign welding machine work at the site to engineers represented by Respondent. The Board concluded that Respondent sought to achieve the assignment of this disputed work by applying economic pressure on neutrals to the distpute—

Intervenor-Petitioner Burns and Roe, Inc., the general contractor, and subcontractors Chicago Bridge and Iron Co., and Poirier and McLane Corporation, with an object of causing a disruption of the business relationship among the various employers at the job site, all in violation of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, 29 U.S.C. Sec. 158(b)(4)(B) (hereinafter called the Act) and made an order accordingly.

The Third Circuit refused to enforce the secondary boycott portion of the Board's order and held that ". . . proof of coercive activity amounting to 'disruption of a business relationship' and aimed at causing a neutral employer to put pressure on a primary employer is insufficient, without more, to establish an effort to compel one employer to 'cease doing business' with the other . . ." within the meaning of the statute. Thus, the Court of Appeals held the object proscribed by Section 8(b)(4)(B) must be a literal and complete cessation of business rather than a disruption of the business relationship. The question presented is:

In order to prove a violation of the secondary boycott provisions of the National Labor Relations Act [Section 8(b)(4)(B)] is it necessary to establish that a union's object is to bring about a total cessation of business between the neutral and primary employer?

Statute Involved

The provision of the National Labor Relations Act of 1947, as amended, involved herein is Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), as follows:

> ". . . (b) It shall be an unfair labor practice for a labor organization or its agents . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

Statement of the Case

This case arises from a decision of the Court of Appeals for the Third Circuit refusing to enforce an order of the National Labor Relations Board (hereinafter N.L.R.B.) finding in part that Respondent, Local 825, International Union of Operating Engineers, AFL-CIO, violated Section 8(b)(4)(i)(ii)(B) of the Act. Burns and Roe, a general contractor, was engaged to construct a $68 million dollar

nuclear power generating plant for Jersey Central Power and Light Company, a public utility, at Oyster Creek, Forked River, New Jersey. White Construction, Chicago Bridge & Iron and Poirier & McLane were all subcontractors of Burns and Roe at said project. It should be noted that Burns and Roe subcontracted all of its work and employed no direct labor. White Construction employed Ironworkers to do certain welding work at the site and Respondent demanded that Operating Engineers be employed instead. White Construction refused and there followed threats by Respondent against Burns and Roe and threats and actual work stoppages against Poirier and McLane and Chicago Bridge & Iron, all with an object, found the Board, of bringing about a cessation of business within the meaning of the Act, between Burns and Roe and White Construction Company.

The Third Circuit held that the object of Respondent was not to bring about a total and permanent cessation of business between Burns and Roe, Inc. and White Construction Company, but merely to coerce Burns and Roe, Inc. so that Burns and Roe would put pressure upon White Construction to succumb to Respondent's demands. Such an object, said the Court, *i.e.* disruption and stoppages short of a complete and total cessation of business, "however objectionable or deserving of condemnation it may be, falls short of the 'cease doing business' object proscribed by the Act."

In its decision, the Third Circuit cited for comparison the decision of the Court of Appeals for the Fifth Circuit in *N.L.R.B.* v. *Carpenters District Council of New Orleans and Vicinity, AFL-CIO*, No. 25408, decided February 19, 1969 and reported at 407 F. 2d 804 which applied the traditional N.L.R.B. interpretation that proscribed conduct which has as an object a disruption of the business

relationship even though something less than a total cancellation of the business connection is a "cease doing business" object within the meaning of Section 8(b)(4)(B) of the Act.

A. Proceedings Below

1. This case arose from an unfair labor practice charge filed by Burns and Roe, Inc. with the N.L.R.B. on October 3, 1965 (case No. 22-CC-359), against Local 825, International Union of Operating Engineers, AFL-CIO, alleging a violation of Section 8(b)(4)(i)(ii)(B) of the Act and a charge filed by White Construction Company on March 5, 1965 against Local 825, International Union of Operating Engineers, AFL-CIO alleging a violation of Section 8(b)(4)(i)(ii)(D) of the Act. (Case No. 22-CD-144). Only the former charge is at issue here.

2. On September 28, 1966 the Trial Examiner of the N.L.R.B. issued his Decision, finding a violation of Section 8(b)(4)(i)(ii)(D) but dismissing the General Counsel's complaint insofar as it alleged a violation of Section 8(b)(4)(i)(ii)(B) of the Act.

3. On February 13, 1967 the N.L.R.B. issued its Decision and Order adopting the Trial Examiner's Decision insofar as it found a violation of Section 8(b)(4)(i)(ii)(D) of the Act, but reversing his Decision insofar as he failed to also find a violation of Section 8(b)(4)(i)(ii)(B) of the Act.

4. On April 25, 1969 the Court of Appeals for the Third Circuit granted enforcement of only so much of the N.L.R.B.'s Order that pertained to a violation of Section 8(b)(4)(i)(ii)(D) of the Act.

5. On May 29, 1969 the Court of Appeals for the Third Circuit entered its Judgment in this matter.

6. On June 12, 1969 the Court of Appeals for the Third Circuit dismissed a petition for rehearing filed by the N.L.R.B.

B. Factual Background

The essential facts as found by the N.L.R.B. and adopted by the Circuit Court in this case are as follows:[1]

In September, 1964, Burns and Roe, Inc. (herein called "Burns") started construction of a $68 million dollar nuclear power generating plant at Oyster Creek, Forked River, New Jersey for the Jersey Central Power and Light Company. (Appendix A p. 4a). As general contractor, Burns subcontracted all construction work to White Construction Company (herein called "White"), Chicago Bridge and Iron Company (herein called "Chicago Bridge") and Poirier and McLane Corporation (herein called "Poirier"). (Appendix B p. 34a). Burns did not itself employ any construction workers. All the operating engineers on the project were members of Local 825, which had bargaining contracts with Chicago Bridge and Poirier but not with Burns or White. (Appendix B p. 34a). Burns, however, had a national agreement with the International Union of Operating Engineers, and both Burns and White were members of the Building Contractors Association of New Jersey which had contracts with Local 825 prior to 1963.[2]

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[1] References are to the page of Appendices A and B, the decisions of the Trial Examiner and the N.L.R.B. respectively wherein the facts appear. In this connection it is noted that the decision of the N.L.R.B. adopts the factual findings of the Trial Examiner insofar as they are consistent with its decision and order.

[2] It should be noted that the absence of a contract with the Building Contractors Association of New Jersey was attributable

(Footnote continued on following page.)

White came on the job in the beginning of September, 1965 and assigned the work of starting and stopping an electric welding machine to its ironworker employees who were to use the machine for welding structural steel. When the welding machine was installed at the job site during the week of September 20, Chris Gunderson, White Construction Superintendent, was approached by Bill Bonatz, Job Steward for Local 825 and Hank Behrend, Lead Engineer for Poirier, found by the NLRB to be agents of Local 825 (Appendix B p. 34a) and was told that he needed an operating engineer from Local 825 to push the buttons which started and stopped the machine. (Appendix B p. 35a). Gunderson checked with his office and was informed that the work had been assigned to the Ironworkers. (Appendix B p. 35a). On September 30, Gunderson was again approached by Bonatz and Behrend who told him that they were going "to knock the engineer off the crane," and handed him three copies of an agreement with Local 825 for White to sign. (Appendix B p. 35a). This contract gave Local 825 jurisdiction over all power equipment including electric welding machines; and forbade subcontracting by a party to the agreement unless the subcontractor agreed to perform the work subject to all the terms of the contract. Shortly thereafter,

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(Footnote continued from preceding page.)

to the matters covered in *International Union of Operating Engineers, Local 825, et als. (Building Contractors Association of New Jersey)* 145 NLRB 952, wherein the Board found a refusal to bargain violation to have been commited by Local 825 and which was not enforced by the Third Circuit until August 5, 1966. *NLRB* v. *International Union of Operating Engineers, Local 825, et al. (Building Contractors Association of New Jersey)* (CA 3 Civil No. 15928, (unreported) (Appendix A p. 5a and Appendix B p. 34a). After that enforcement decree a contract did subsequently result.

at about 10:00 a.m. on September 30, the engineer and oiler stopped work. They did not return until 1:00 p.m. on October 1. (Appendix B p. 35a).

At the same time the Union also spoke to other contractors at the job site. On September 29 Bonatz and Behrend visited Giles Willis, resident Construction Manager for Burns, and told him that the members of Local 825 employed by his subcontractors had voted to cease work after October 1 unless Burns signed a contract with the Union. (Appendix B p. 35a). The next day, Bonatz and Behrend returned with Bobby Illario, Lead Engineer for Chicago Bridge, who was also found to be an agent of Local 825 by the NLRB (Appendix B p. 35a). Illario gave Willis copies of the same contract that had been given to Gunderson and repeated that all the operating engineers would walk off the job unless Burns signed by the following morning. (Appendix B p. 35a).

On the same day, September 30, R. T. Daricek, Superintendent for Chicago Bridge, asked Bonatz if the rumors that a work stoppage the following day were true. Bonatz replied no engineer would work for anyone if Burns did not sign a contract with Local 825. When Daricek protested that Chicago Bridge had signed a contract and that it had no dispute with the Union, Bonatz said that all the contractors were required to sign. (Appendix A p. 8a).

The following morning, October 1, the three Union representatives again met Willis and asked if Burns had signed the contract. When Willis replied in the negative, they proceeded to the parking lot and engaged in conversations with the engineers who were gathered there. The engineers employed by White, Chicago Bridge and Poirier then left the area and did not report for work until about 1:00 p.m. (Appendix B p. 35a).

On October 6, Bonatz and Illario told Willis that unless an operating engineer was assigned to the electric welding machine, no engineers would work the following day. Illario who did the talking also brought up the failure of Burns and White to sign contracts with Local 825. Willis informed the Union representative that Burns had a national agreement with the International Union and was not required to sign local contracts, and also told them that any change in the assignment to the ironworkers would have to be made by the Joint Board for the Settlement of Jurisdictional Disputes. The same day, Burns formally submitted the work assignment dispute to the Joint Board for the Settlement of Jurisdictional Disputes (Appendix A, p. 10a).

Poirier's General Superintendent, Telghman Suffrecal, was also warned by Behrend on October 6 that his 20 engineer employees might not work the following day (Appendix A, p. 10a). In response to questioning, Bonatz told Daricek of Chicago Bridge that the engineers would not operate its machines. The operating engineers employed by White, Chicago Bridge and Poirier did not report for work from October 7 until October 11 (Appendix B, p. 38a).

When the engineers failed to show up on October 7, Gunderson called the main office of Local 825 and asked for replacements for the following day. Two men appeared but they insisted on checking with the operating engineers on the job before going to work. They left and did not return.

On October 8, when the strike was in progress Bonatz told Langlinais, Project Manager for Chicago Bridge, that the work stoppage was a direct result of the welding machine assignment and the failure of Burns and White to

sign contracts with Local 825 (Appendix A, p. 11a). When Langlinais protested that Chicago Bridge had a contract with the Union and that the work stoppage was costing it a lot of money, Bonatz suggested that Chicago Bridge "do what Poirier and McLane was doing, bill Burns" for the loss.

Three days later, Behrend told Suffrecal that the engineers might be back the following day, October 12. Upon being questioned by Suffrecal, Behrend admitted that the Union's dispute was with Burns and White and there was no dispute with Poirier. Poirier's and Chicago Bridge's engineers returned to work on October 12 and worked regularly thereafter (Appendix A, p. 11a).

Upon the foregoing facts and the entire record, the Board found a preponderance of evidence established that Local 825, with an object to force or require White to assign the disputed work to engineers represented by the Respondent, induced or encouraged employees employed by White, Chicago Bridge and Poirier to engage in a work stoppage on October 1, 1965 and threatened, restrained or coerced Burns and other employers, all in violation of Section 8(b) (4) (i) and (ii) (D) of the Act (Appendix B, p. 37a). The Board also found that Local 825 was responsible for the strike on October 7, and that by its work stoppages of October 1 and 7, 1965 Local 825 violated Section 8(b) (4) (i) and (ii) (B) of the Act (Appendix B, p. 37a). In reaching this conclusion, the Board noted that Respondent's strike threats and strikes were in furtherance of the Respondent's primary dispute with White who refused to reassign the welding machine work to engineers represented by Respondent. It is equally clear, the Board stated, that the Respondent sought to achieve the assignment of this disputed work by applying economic pressure on neutrals to the dispute—Burns, the

general contractor, and subcontractors Chicago Bridge and Poirier—with an object of causing a disruption of the business relationship among the various employers at the job site (Appendix B, p. 38a). This, the Board concluded, constituted a cease doing business object within the meaning of Section 8(b) (4) (B) of the Act, "although something less than a total cancellation of the business relationship." It found therefore that within the meaning of the Statute, an object of Respondent's conduct was to force Burns to cease doing business with White and to force Chicago Bridge and Poirier to cease doing business with Burns in order to compel Burns to cease doing business with White.

As stated above, the Circuit Court of Appeals for the Third Circuit did not take issue with any of these facts as found by the N.L.R.B. but rather upon these facts held the cease doing business object proscribed by Section 8(b) (4) (B) of the Act was not violated. The difference between the Board and Court decisions lies in the interpretation of the Act— Whether a disruption of the business relationship, as the Board holds, is a "cease doing business object," or must it be nothing short of a total and literal cessation of the relationship as the Court below held. Accordingly, the Court refused to enforce that portion of the Board's Order finding a violation of Section 8(b) (4) (i) (ii) (B) of the Act.

C. Federal Jurisdiction

Federal Court jurisdiction in this matter is invoked under 29 U.S.C. 160(e) and (f) which provides for enforcement of orders of the N.L.R.B. by the appropriate Court of Appeal wherein the unfair labor practice in question arose and which provides also for review by this Court of the judgment and decree of the Court of Appeal upon writ of *certiorari* as provided in 28 U.S.C. 1254.

Reasons for Granting the Writ

The decision below should be reviewed because it erroneously interprets the National Labor Relations Act and vitiates for all practical purposes the secondary boycott provisions of that statute. Moreover, as recognized by the Court itself, its decision in this regard is in direct conflict with a decision of the Circuit Court of Appeals for the Fifth Circuit in *N.L.R.B.* v. *Carpenters District Council of New Orleans and Vicinity, AFL-CIO* (No. 25408) 407 F. 2d 804 decided February 19, 1969. Petitioner contends that the interpretation of the Fifth Circuit in the cited decision which comports with well established principles of the National Labor Relations Board and of other courts of appeals is the correct one.

In *N.L.R.B.* v. *Denver Building Trades Council*, 341 U. S. 675, 692 (1951), this Court recognized the objective of Congress in enacting section 8(b) (4) (B), formerly Section 8(b) (4) (A) of the National Labor Relations Act as amended, 29 U.S.C., Sec. 158(b) (4) (B), hereinafter called the "Act" as follows:

> "In the views of the Board as applied to this case we find conformity with the dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[3]

The decision of the Third Circuit which Petitioner seeks to have reviewed would permit pressures upon unoffending employers and others in controversies not their own

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[3] See also *National Woodwork Mfrs Ass'n* v. *N.L.R.B.*, 386 U. S. 612, 623-626, 632.

—provided those pressures did not have as their object a total and permanent cessation or cancellation of the business relationship between that employer and the employer with whom the Union did have a real dispute. The substance of the decision below is to be found in the following statement of the Court:

> "The record amply justifies the conclusion that these contractors were subjected to coercion in the form of threats or walkouts or both. The debatable issue is whether the object of this coercion was to force Burns to 'cease doing business' with White within the meaning of Section 8(b) (4) (B).
>
> "It was not the Board's theory, nor does it seem seriously to be contended that the respondent sought to compel Burns to stop using the services of White or to terminate its contract with White. Indeed, such action would not have been advantageous to the respondent. Rather, it is said that the respondent undertook to 'disrupt the business relation' between Burns and White so that the contractor would try to induce the subcontractor to comply with the respondent's demands. The question is whether the conduct so intended seeks to compel the one contractor to 'cease doing business' with the other within the meaning of section 8(b) (4) (B).
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> "We considered a similar situation in N.L.R.B. v. Local 825, International Union of Operating Engineers, 3d. Cir. 1964, 326 F. 2d 218, 55 LRRM 2116, and concluded that the finding of a 'cease doing business' objective was not warranted. It is now urged that this case is distinguishable from that one because in the earlier case the work stoppages, though to the neutral employer's detriment, were

not attended by any communication of the union with that employer. However, the disruption of the neutral employer's business activity in connection with the primary employer and the objective of exerting pressure upon the primary employer through the neutral one was essentially the same there as here. Indeed, we quoted but did not approve the Board's finding:

'". . . Even, assuming, *arguendo,* that Respondent merely intended by its strike to force Selby and Elmhurst to require Nichols to change its method of operation, this in itself would have disrupted or seriously curtailed the existing business relationship between Nichols and these two other contractors, which would have been tantamount to causing the latter employers to cease doing business with Nichols".' 326 F. 2d at 220.

"Moreover, in neither case did the union admit a 'cease doing business' objective was, but rather in both cases the circumstances compelled the inference that the union wanted the contractor to use its influence with the subcontractor to change the *subcontractor's conduct, not to terminate their relationship.* (italics supplied).

"Accordingly, following our earlier decision, we hold that proof of coercive activity amounting to 'disruption of a business relationship' and aimed at causing a neutral employer to put pressure on the primary employer is insufficient, without more, to establish an effort to compel the one employer to 'cease doing business' with the other. The language of section 8(b) (4) (B) is apt to prohibit the classical secondary boycott where the attempt is made to coerce the primary employer by compelling oth-

> ers to stop trading or otherwise dealing with him. But we think the 'cease doing business' language is not apt to cover the objective proved here, however, objectionable or deserving of condemnation it may be. But cf. N.L.R.B. v. Carpenters District Council of New Orleans and Vicinity, AFL-CIO, 5th Cir., No. 25408, decided February 19, 1969, 70 LRRM 2726. We think it is for Congress to broaden the language of section 8(b) (4) (B) if it desires to cover such situations as this."

In short, therefore, the Third Circuit interprets the Act as requiring proof that the labor organization asserting economic pressure upon a neutral employer must have as its objective no less than a total and permanent severance of the business relationship between that employer and the employer with whom it has a primary dispute. The National Labor Relations Board, the agency charged by Congress with a mandate to interpret and enforce the provisions of the Act and whose expertise in such interpretation has been recognized by this and other Federal Courts in 22 years under Taft-Hartley, has never so literally construed the language of Section 8(b) (4) (B). Rather, it has long taken the view that coercive activity against an employer that has as an object a disruption or serious curtailment of the business relationship between that employer and another violates the secondary boycott provisions of the Act. The Act, in the view of the Board, does not require that the Union have as its objective a permanent and total rupture of the business relationship as held by the court below.

For example, in *Electrical Workers Union (New York Telephone Company)*, 140 NLRB 729, 730 (1963), the Board stated:

"Even assuming *arguendo* that respondent did not consciously contemplate imposition of this sanction. it is nonetheless clear that respondent sought by its threat to require that the company superimpose upon its existing agreement with Delee an added condition of performance that the work had to be done by Respondent's members. Acceptance of this condition by Delee would require the company to cease doing business with Delee on the basis of their original arrangement. The objective of causing such a disruption of an existing business relationship, even though something less than a total cancellation of the business connection, is a 'cease doing business' object within the meaning of section 8(b) (4) (B) of the Act."

The Board's finding in that case was sustained by the Court of Appeals for the Second Circuit, in *N.L.R.B.* v. *Electrical Workers, I.B.E.W.* (New York Telephone Co.) 325 F. 2d 561 (1963).

In *Longshoremen's Union* (*National Sugar Refining Co.*), 142 NLRB 257, the Board reached the same conclusion and its decision was subsequently enforced by the Third Circuit in *N.L.R.B.* v. *Longshoremen's Union* (National Sugar Refining Co.) 332 F. 2d 559 (1964).

Many other decisions of the Board and the Circuit Courts are to the same effect.[4]

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[4] For other decisions of the Board and the Courts to the same effect, see *International Brotherhood of Electrical Workers, AFL-CIO, et als. (Bendix Radio Division of the Bendix Corporation)*, 138 NLRB No. 993, *Local Union 825, International Union of Operating Engineers, (Nichols Electric Company)*, 138 NLRB 540

(Footnote continued on following page.)

For the purposes of this Petition it would appear sufficient to quote the very significant language of the Seventh Circuit on this issue. In *N.L.R.B.* v. *Milk Wagon Drivers Union (Pure Milk Association)*, 335 F. 2d 326, 328 (1964), that Circuit stated:

> "We think the Board was justified in deciding that the Union's conduct following their demands under their 'broadened interpretation' of Article 44 constituted unfair labor practices; and that the Union threatened to, and did, strike, because Wanzer could not, or would not, continue to have the eight displaced Union men drive the tank-trucks hauling the milk. The Board could also reasonably infer that to accede to the Union demands would be forcing Wanzer to disrupt, or cease, a business relationship with PMA; that the Union knew or should have known that this would be a necessary result of the demands; that accordingly the Union's con-

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(*Footnote continued from preceding page*)

enf. den. 326 F. 2d 218 (CA 3) *Local 1066, International Longshoremen's Association, (Wiggin Terminals)*, 137 NLRB 45, *New York Mailers Union No. 6, International Typographical Union, AFL-CIO (The Publishers Association of New York City)*, 136 NLRB 196, enf. 316 F. 2d 371 (C.A.D.C.) *Plumbers Union of Nassau County, Local 457, UA (Jerry Bady, d/b/a Bomat Plumbing and Heating)*, 131 NLRB 1243, enfd. 299 F. 2d 494, (C.A. 2); *Highway Truck Drivers and Helpers, Local 107 IBT (E. A. Gallagher & Sons)*, 131 NLRB 925, enfd. 302 F. 2d 897 (C. A. D. C.); *International Longshoremen's Association, AFL-CIO (Bd. of Harbor Commissioners)*, Wilmington, Del., 137 NLRB 1178 enf. as mod. 331, F. 2d 712 (C. A. 3), *Building and Construction Trades Council (Boston Gas Co.)*, 137 NLRB 1299; enf. in *Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 12*, 320 F. 2d 250 (C. A. 1).

duct was unlawful under Sec. 8(b) (4) (i) and (ii) (B); and that in striking to enforce Article 44, as interpreted by it, the Union was forcing Wanzer to condition whatever means were to be used to transport the milk on employment of Local 753 members, an unfair labor practice under Sec. 8 (b) (4) (i) and (ii) (A). District No. 9, Int'l Ass'n of Machinists v. N.L.R.B., 315 F. 2d 33, 51 LRRM 2496 (D. C. Cir. 1962). We are unable to say these inferences are clearly erroneous.

"Neither can we say that, on those findings, the Board could not reasonably conclude that one of the objects of the Union's conduct was to force a disruption of the business relationship among Wanzer, PMA and Quality. NLRB v. Denver Bldg. & Constr. Council, 341 U. S. 675, 688, 28 LRRM 2108 (1951). Less than a total cessation of an existing business relationship is within the meaning of 'cease doing business' in Sec. 8 (b) (4) (B). Local 3, Int'l Bhd. of Elec. Workers, 140 NLRB 729, 730, 52 LRRM 1118 (1963), enforced 325 F. 2d 561, 55 LRRM 2076 (2d Cir.).

"The inference is warranted that the Union, virtually, exerted pressure on Wanzer to break its contract with PMA that the milk be delivered f.o.b. Chicago unless Quality's drivers were members of Local 753. It follows that we must disagree with the Union's contention that it had not committed an unfair labor practice because it was not asking Wanzer to cease doing business with anybody, not asking Wanzer to buy milk from anybody but PMA at any time, but only asking Wanzer to live up to its agreement."

The most compelling reason for granting the writ petitioned for herein is that the decision below is in direct conflict with a decision of the Fifth Circuit issued on February 19, 1969 in *N.L.R.B.* v. *Carpenters District Council of New Orleans and Vicinity, supra,* at p. 806 in which that Circuit on the same issued stated:

> "Thus, this case presents a classic example of secondary coercion: The union brought a neutral employer into its conflict with a primary employer by inducing employees of the neutral to strike and by appealing directly to the neutral's officers. One of the Union's defenses is that secondary pressure is not prohibited by the statute unless an object thereof is to force the neutral to cease doing business with the primary employer. The union argues that it never suggested to Southern that it should cease doing business with Delta and had no desire for this to happen; it simply wanted Southern to influence Delta to rehire carpenters. Concededly, the subcontracting agreement between Southern and Delta did not require Delta to use carpenters, but respondent nevertheless argues that it was merely pressuring Southern to use its influence with Delta and that it would not have benefitted in the least from a severance of relations between the two companies. While the statute [8 (b) (4) (B)] by its literal terms does require that an object of illegal secondary pressure be to force a neutral to cease doing business with a primary employer, the Board has said, and we agree, that the objective of causing a serious disruption of an existing business relationship, even though something less than a total cancellation of the business connection, is within the intendment of the statute. Electrical Workers

Union, Local 3, 1963, 140 NLRB 729, 52 LRRM 1118, enf'd, 2d Cir. 1963, 325 F. 2d 561, 55 LRRM 2076; Longshoremen's Union, Local 1066, 1962, 137 NLRB 45, 50 LRRM 1056; International Typographical Union, 1962, 136 NLRB 196, 49 LRRM 1736, enf'd, D. C. Cir. 1963, 316 F. 2d 371, 52 LRRM 2433. In this case, the union's objective was to force Southern to add a condition to its existing subcontracting agreement with Delta, namely, that Delta use only carpenters. Stated another way, the union's objective was to force Southern to cease doing business with Delta under the existing contractual arrangement, which did not require Delta to use carpenters on the work. Secondary coercion to force a neutral to add a condition of this kind to its existing contractual arrangement with the primary employer is an illegal objective within the meaning of the statute. The necessary elements for a violation of 8 (b) (4) (i) and (ii) (B) were established."

As the above quoted language of the Fifth Circuit inferentially recognizes, in many, if not most secondary boycott situations, the offending Union's preferred objective is not to force a literal and total cessation of business relations, but merely to so alter the conditions under which the business relationship was first entered into that the Union's demands are met. Perforce the Congressional objective of shielding unoffending employers from pressures in controversies not their own as recognized by this Court in *N.L.R.B.* v. *Denver Building Trades Council, supra,* cannot be achieved under the Third Circuit construction of the statute.

Finally, Petitioner urges that review should be granted because the decision of the Third Circuit imposes upon

the charging party and the General Counsel of the Board a burden of proof which is virtually impossible to sustain. In its decision, the Third Circuit noted that the Union did not "admit" a cease doing business object (Appendix C p. 51a). Obviously, absent such an admission, under the criteria established by this decision a cease doing business object would be virtually impossible to establish and thus a violation of the statute highly improbable. It is submitted the protection afforded by section 8 (b) (4) (i) (ii) (B) was never intended to be so illusory.

Thus, the question presented by this case is one of great and recurring significance in the enforcement of the National Labor Relations Act. Its ramifications in all industries and particularly in the construction industry are far reaching and it establishes a precedent which, if permitted to stand, will reshape labor relations as heretofore understood and have a substantial adverse impact upon interstate commerce.

CONCLUSIONS

For the reasons set forth above, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

APRUZZESE & MCDERMOTT
Attorneys for Petitioners
By: VINCENT J. APRUZZESE
A Partner

APPENDIX A

Trial Examiner's Decision

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Washington, D. C.

Case No. 4-CC-359

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

and

BURNS & ROE, INC.

Case No. 4-CD-144

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

and

WHITE CONSTRUCTION COMPANY.

LEO F. HANNON, ESQ., and BURTON B. SUBRIN, ESQ., of Philadelphia, Pa., for the General Counsel.

VINCENT J. APRUZZESE, ESQ. of Newark, N. J., for the Charging Parties.

Appendix A

EARL S. ARONSON, ESQ., for THOMAS E. DURKIN, ESQ., of Newark, N. J., for the Respondent.

Before:

JOHN F. FUNKE,
Trial Examiner.

Statement of the Case

A charge having been filed by Burns & Roe, Inc., herein Burns, on October 8, 1965, against Local No. 825, International Union of Operating Engineers, AFL-CIO, herein Local 825 or the Respondent, alleging Respondent violation Section 8(b)(4)(i) and (ii)(B) of the Act and a charge have been filed by White Construction Company, herein White, on November 5, 1965, against Respondent alleging it violated Section 8(b)(4)(i) and (ii)(D) of the Act, the General Counsel issued a consolidated complaint against Respondent alleging violation of said Section.

The answer of Respondent denied the commission of any unfair labor practices.

This proceeding with all parties represented was heard before me on January 6 and 7, March 31, April 1 and May 16, 1966, at Philadelphia, Pennsylvania.[1] At the con-

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[1] The hearing was originally scheduled for December 7, 1965. At the request of counsel for the Respondent the hearing was rescheduled by the Regional Director for Region Four on January 6. On that date the Examiner recessed the hearing until January 7, 1966, at request of counsel for Respondent made through the General Counsel. On January 7, no representative of the Respondent appeared and the hearing was opened, testimony taken and the hearing closed. On January 25, counsel

(*Footnote continued on following page*)

clusion of the hearing the parties were granted leave to file briefs and briefs were received from the General Counsel.[2]

Upon the entire record and from my observation of the witness, including their demeanor while testifying, I make the following:

Findings and Conclusions

I. The business of the Companies involved

Burns is a New Jersey corporation engaged as engineering constructor for Jersey Central Power & Light Co., at a nuclear power plant at Oyster Creek, New Jersey.

(*Footnote continued from preceding page*)

for Respondent, Thomas E. Durkin, Jr., moved to reopen the hearing and, the General Counsel not opposing the motion, the motion was granted by the Trial Examiner by order of February 8, and the date of the reopened hearing was fixed for February 24. The order limited the reopened hearing to cross-examination of the General Counsel's witnesses and to the testimony of Respondent's witnesses and Respondent's documentary evidence. By agreement of the parties the reopened hearing was again postponed to March 21 and, at request of the counsel for the Charging Parties it was again postponed until March 31. At the conclusion of the hearing on April 1, two witnesses under subpena by Respondent failed to appear (one due to illness) so the hearing was recessed indefinitely. The hearing was reopened on May 16, by agreement of the parties and concluded on that date.

[2] A brief was received from the General Counsel on January 25, following the close of the hearing on January 7. At the conclusion of the reopened hearing the General Counsel was given leave to file a supplemental brief and counsel for the Respondent leave to file a brief. A supplemental brief was received from the General Counsel July 1.

Appendix A

During the course of the construction of the Oyster Creek plant Burns purchased materials valued in excess of $50,000 annually from points outside the State of New Jersey.

White is a New York corporation engaged as a subcontractor for Burns at Oyster Creek in the construction of a reactor plant at the site. During the course of construction of this plant White has purchased materials valued in excess of $50,000 annually from points outside the State of New Jersey.

At all times material herein Porier & McLane Corporation, herein, Porier, and Chicago Bridge & Iron Co., herein Chicago Bridge, have been engaged as subcontractors for Burns at Oyster Creek.

Burns, White, Porier and Chicago Bridge are engaged in commerce within the meaning of the Act.

II. The labor organizations involved

Respondent and Local Union No. 350, International Association of Bridge, Structural & Ornamental Ironworkers, herein the Ironworkers, are labor organizations within the meaning of the Act.

III. The unfair labor practices

A. *The facts*

1. Background

In September 1964, Burns started construction of a multimillion dollar nuclear power generator plant at Oyster Creek, New Jersey, for Jersey Central Power and Light Company. Burns was the architect engineer and general contractor but employed no construction workers.

Appendix A

Construction was subcontracted to White (construction of the reactor building), to Chicago Bridge (construction of compression chambers, containment vessel and suppression chambers for the reactor) and to Porier (construction of the turbine structure, intake and discharge structures).[3] All the operating engineers on the job were represented by Local 825. Neither Burns nor White had a contract with Local 825, Chicago Bridge and Porier did. Burns had a contract with the International Union of Operating Engineers, and both Burns and White were members of the Building Contractors Association of New Jersey which had had contracts with Local 825 prior to 1963. On January 9, 1964, the National Labor Relations Board in *Local 825, Operating Engineers,* 145 NLRB 952, found Respondent in violation of Section 8(b)(1) and (3) of the Act for attempting to bargain unilaterally with the individual members of the Association.[4]

2. The work stoppage on October 1

Robert C. Kylberg, general superintendent for White until the middle of January 1966, testified that discussion as to the assignment of an electric welding machine to be used at Oyster Creek by White started in August 1965, before White commenced operations at the site. These discussions were conducted with the contractors association (presumably the Building Contractors Association) and it was decided to give the assignment to the Iron-

[3] There were other subcontractors who were not involved in the dispute.

[4] The Board issued a supplemental decision in this case on February 2, 1966, which did not relate to or affect the Board's 8(b)(1) and (3) findings.

workers. Kylberg testified that this decision was arrived at by "consensus."

Robert A. Escher, president of White, testified that early in September (White started on the job on September 1, 1965), he had a meeting with representatives of the various crafts to discuss the job in general and among those present were Peter Weber, president of Local 825, and T. J. Norton, business agent for the Ironworkers. There was, according to Escher, no discussion of the operation of the electric welding machine which did not arrive at the jobsite until on or about September 20.

Chris Gunderson, construction superintendent for White at Oyster Creek, testified that when White installed the electric welding machine at the jobsite in September he was approached by Bill Bonatz, job steward for Local 825, and Hank Behrend, lead engineer for Porier, and was told he needed an engineer to push the buttons which started and stopped the machine.[5] Gunderson called his

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[5] Respondent concedes that Bonatz was an agent of Local 825. It does not concede that two lead engineers, Behrend for Porier and Illario for Chicago Bridge, were agents. A lead engineer, also called a master mechanic, is provided by and designated by Local 825 when five or more engineers are employed by a contractor at a jobsite. The duties of a lead engineer are defined in Local 825's contract (General Counsel's Exhibit No. 10) Article II, section as follows:

> He shall be responsible for the performance of all duties of Engineers, Apprentice Engineers, Repair Mechanics, Oilers, Firemen, Maintenance Engineers, and other employees under his jurisdiction under the direction of the Employer.

(*Footnote continued on following page*)

office and was told that the work had had been assigned to the Ironworkers. When or where Gunderson reported this to Bonatz and Behrend is not disclosed but on September 30 Gunderson was again approached by them and told they were "to knock the men off the crane" (White at this time had one crane operating with an engineer and an oiler) and gave him three copies of an agreement with Local 825 for White to sign.[6] According to Gunderson his engineer and oiler stopped work at 10 a.m. on September 30 and did not return to work until about 1 p.m. on October 1.[7]

Giles Willis, resident construction manager for Burns at Oyster Creek, testified that on September [illegible] 1965, he

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(*Footnote continued from preceding page*)

He will not be allowed to operate an Engine, only in the temporary absence of the regular engine. He shall have complete supervision over all repairs made on all machines and other automotive equipment used, when such repairs are done on the job.

The testimony in this case, however, establishes that Behrend and Illario participated with Bonatz in submitting demands upon the contractors, that they warned the contractors when stoppages were to occur and told the contractors what the causes of dispute were. It was Behrend and not Bonatz who call the Newark office of Local 825 when the first walkout occurred. Having joined with the job steward and having displayed authority equal to his when disputes and stoppages arose I think it clear that they acted as agents of Local 825 and there is no evidence that Local 825 ever repudiated this authority.

[6] General Counsel's Exhibit No. 10.

[7] Whether or not White's engineers quit on September 30 the engineers employed by Chicago Bridge and Porier worked that day.

met in his office at the jobsite with Bill Bonatz and Hank Behrend who told him that members of Local 825 employed by subcontractors at the jobsite had taken a vote to cease work unless Burns signed a contract with Local 825. On the next day Bonatz, Behrend and Bobbie Illario saw Willis, and Illario give him three copies of a standard Local 825 contract[8] and told him that unless Burns signed them all the members of Local 825 employed at Oyster Creek would walk off.[9] The following day, October 1, at 8 a.m. Bonatz, Behrend and Illario again met Willis and asked if Burns had signed that contract and when Willis replied in the negative they left his office. Willis saw them proceed to the parking lot outside the gate where the engineers were gathered and after what appeared to be some discussion the engineers left.

R. T. Daricek, superintendent for Chicago Bridge, testified that on September 30 he met Bonatz and asked him if the rumors were true that the engineers would not work the following day and was told by Bonatz that if Burns did not sign a contract with Local 825 the following morning no engineers would work. When Daricek protested that Chicago Bridge was under contract with Local 825 Bonatz told him that all the contractors must have contracts.

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[8] General Counsel's Exhibit No. 4. This exhibit is the same as General Counsel's Exhibit No. 10 which was submitted to White for signature. Both are copies of Local 825's A.G.C. contract.

[9] Although this remark is denied by Illario, I found Willis to be a completely credible witness and I accept his testimony on this point.

Behrend and Bonatz testified that this stoppage took place after the members of Local 825 employed on the job (approximately 35) held a meeting in the Porier shanty on September 28 and expressed disagreement with the policies of Burns and White. Their disagreement with Burns was directed to the failure of Burns to enter into a contract with Local 825 and with White to its failure to contract with Local 825 and with its assignment of work on the welding machine to the Ironworkers. It was the testimony of both witnesses that this was a spontaneous reaction on the part of the members and was not directed nor instigated by any official of Local 825. The members did not go to work on the morning of October 1.

Behrend testified that when the men failed to go to work he called the office of Local 825, spoke to a clerk and informed him of the work stoppage. Subsequently he received a call from Peter Weber, business manager of Local 825, to get the men back on the job "right away." Behrend complied with instructions, made several telephone calls, contacted Bonatz in a restaurant and the work was resumed. There is no evidence, apart from Behrend's testimony that Weber told him the matter had been settled, as to why Weber told him to get the men back to work. (Weber did not testify at the hearing.)

3. The stoppage on October 7

Gunderson testified that on October 6 he still had one engineer and an oiler working for him and that on October 7 neither "showed up." Gunderson called Local 825 at Newark and asked for replacement for the next day. The next day an engineer and oiler appeared at the site, told him they were going to check with the other en-

gineers before going to work and he "didn't see them since." On October 12 the engineers employed by White returned to work. There is no explanation in the testimony of either Gunderson, Kylberg nor Escher, as to the reason for the stoppage nor for the return.

Willis, however, testified that at about 4 p.m. on October 6 Bonatz and Illario came to his office and told him that unless an operating engineer was assigned to the welding machine there would be no engineers at work the following day and Illario again brought up the failure of Burns and White to sign contracts with Local 825. On that day Burns submitted the dispute over the work assignment to the National Joint Board for the Settlement of Jurisdictional Disputes. (General Counsel's Exhibit Nos. 5 and 6.) Willis told them there would be no change in the assignment unless it was by the Joint Board.

Telghman Suffrecal, general superintendent for Porier, testified that he had 20 operating engineers working on October 6 and that Behrend, shop steward for his engineers,[10] told him he might or might not have engineers the next day. On October 11 Suffrecal again saw Behrend who told him the engineers would return on the 12th. He admitted that Local 825 had no dispute with Porier but that it did have a dispute with Burns and with White.[11]

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[10] Suffrecal was apparently confused since the record is clear that Bonatz was shop steward for all engineers employed at Oyster Creek and that Behrend was lead engineer for Porier. Suffrecal subsequently corrected this testimony.

[11] This statement was denied by Behrend and was the subject of lengthy cross-examination when Suffrecal was recalled on March 31, 1966. Despite Suffrecal's evasive and confusing testimony on the latter date I credit this statement chiefly because the record is barren of any conflict between Porier and Local 825 and the statement was one which would quite likely have been made. Suffrecal was clear and convincing on direct and I credit his testimony on direct.

Behrend gave him no other reason for the stoppage. Porier's engineers worked continuously thereafter.

Langlinais, project manager for Chicago Bridge, testified that his engineers did not work on October 7 and that on October 8 he had a conversation with Bonatz in which Bonatz told him that the stoppage was the direct result of the welding machine assignment and the fact that Burns and White did not have a contract with Local 825. The engineers returned on October 12 and worked thereafter. There was no dispute between Chicago Bridge and Local 825.

The only testimony by any representative of Local 825 relating to this stoppage is that of Bonatz. He testified as follows:

> Q. Correct. Now on or about October 6, 1965, did you say to anyone that unless an operating engineer was assigned to the welding machine there would be no operating engineers on the job the following day? A. Not that I can remember.
>
> Q. There was a work stoppage, was there not, sir, on or about October 7? A. I believe so, yes.
>
> Q. How did this work stoppage come about, do you know? A. I believe they started the welding machine.
>
> Q. Now after the welding machines were started, what happened? A. The men walked off.
>
> Q. Did you tell the men to walk off? A. No, sir.
>
> Q. Well, when the men walked off was there a meeting? A. No, I think the meeting was prior to that.

Q. When, sir? A. A week maybe.

Q. This would be the meeting you discussed back on or about October 1 or on or about September 29? A. I believe so.

Bonatz' statement that he believed the men walked off on this date because White started operating the welding machine may have been made in confusion as to dates. There is no evidence that the machine was started on October 7 and subsequent testimony indicates that the machine was first operated by an ironworker on November 4. (It may have been operated by engineers for 2 days prior to that date.)

4. The work stoppage on November 4

On October 20 the Joint Board notified the parties to the dispute over the welding machine that there was no reason to disturb the assignment of work on the welding machine to the Ironworkers. (General Counsel's Exhibit No. 7.) On October 26 a meeting was held at the jobsite to discuss the award. Kylberg met with Weber, Behrend, Bonatz and Gatti[12] and went to lunch with Weber and Gatti. Weber told Kylberg that the Joint Board award was all wrong and that the assignment of the welding machine meant a great deal to him. He told Kylberg that if he would work with Local 825 it would be advantageous and that if not there would be complications. According to Kylberg he pointed to a crane a few feet away, asked him how he would like to have three men on the crane instead of two. He also asked him how he

[12] Gatti was a member of Local 825.

would like to have a 30-hour week with triple overtime.[13] President Escher of White was at that time on a business trip and it was agreed to withhold final decision until his return. There is nothing in the record to indicate that Escher had any conversation with Weber after his return until December 1.

Gunderson testified that on November 4 he started the welding machine and that his crane operators walked off and surrounded the machine and it was not operated that day.[14] At this time Bonatz came to him and asked if he had signed a contract with Local 825. At this time the witness' testimony was interrupted and he did not give the remainder of the conversation. Gunderson stated that on the next day he again started the machine and it was again surrounded by his engineers and was not operated. On November 8 a temporary injunction was granted by the District Court (General Counsel's Exhibit No. 11) restraining Respondent from striking, etc., to compel White to assign the work of starting and stopping electric welding equipment at Oyster Creek to employees represented by Respondent rather than to members of any other labor organization. Gunderson could not remember when the men resumed work.

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[13] On cross-examination counsel for Respondent attempted to draw a distinction between the use of the words "would" and "could" in this conversation. The distinction, to the extent it exists, is that between a direct and implied threat, a distinction not relevant in Section 8(b)(4).

[14] At this time, according to Gunderson, he employed four engineers, Cherry, Bonatz and Gatti and one whose name he could not recall. These were the men who surrounded the machine.

Bonatz testified that he was working on the crane on November 4 and that when the welding machine started he joined "some of the fellows around the machine." He admitted the machine had been shut off but did not know who did it. He stayed at the welding machine only a few minutes but did not return to his crane. While he testified that the crane was not working he admitted that he did not believe there was anything wrong with it. He did not work November 4 or 5 but again there is no evidence to show when or why he returned.

5. The concrete pump

On November 1 White brought an electric pump to the jobsite to be used for pouring concrete. Gunderson set the pump on November 15 and Bonatz told him he would need an engineer to operate it. Gunderson agreed and told Bonatz to send one out the next day as he wanted to pour on the 17th. On the 16th Illario came out with two additional engineers to act as standbys on the pipe running from the pump and announced that since there were now five engineers on the job he was lead engineer. Gunderson refused to employ the engineers on the ground they were not needed. The next day, the 17th, the same dispute continued and no engineer operated the concrete pump. On that day Ed Smith, Ironworker foreman, told Gunderson the wires on the electric welding machine had been cut and oil poured into the armature. There is no evidence to establish who sabotaged the welding machine. At about noon the other engineers employed by White walked off the job.

Appendix A

Gunderson testified that on either the 16th or 17th[15] he spoke with Illario and that Illario "mentioned the fact that this was more or less because of the electric welding machine being in operation." Since the only dispute at this time was over the number of engineers to be employed and since Illario, who was bringing out the additional engineers, was the only person directly involved in the dispute there can be no doubt that Illario was referring to the pump dispute and attributing it to the welding machine dispute where an injunction prevented a stoppage.

Robert Escher, president of White, testified that he called Weber at his home on December 1, to find out how to get the men back to work. He told Weber in the course of a conversation which lasted over an hour that he had heard that if he took the electric equipment (the welding machine) off the job and put in gasoline equipment that White could go back to work. According to Escher, Weber answered, "Yes, but you have got to sign a contract." Escher told him he could not sign a contract because there had been a dispute between them ever since 1962 over this. (This refers to the efforts on the part of Local 825 to have members of the Building Contractors Association sign individual contracts.)[16] When Escher

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[15] While Gunderson testified that it was either on the 16th or 17th and it is a fact that Gunderson and Illario talked on both days the nature of the remark indicates it was probably on the 17th.

[16] When Escher inquired why Local 825 was supplying engineers on three other White projects in New Jersey, Weber told him he would pull them off the next day. These engineers were never pulled off the White jobs.

tried to discuss the award of the Joint Board Weber told him they (the Joint Board) "didn't know what the hell they were talking about, that this was his work and had been his work historically and that they were just a bunch of dopes and he wasn't going to abide by it and that it meant four hundred new jobs in the State of New Jersey." Weber denied that Norton, president of the International Union of Operating Engineers, had ordered him to put the men back to work, and added that he "didn't have to." Again Weber mentioned such demands as 30-hour week, triple overtime, and four men on a crane.

The engineers who walked off on November 17 returned to work on either December 21 or 22. Again there is no explanation given in the record as to the reason for this return.

B. *Conclusions*

1. Credibility

Credibility is an issue in the case and I have already made certain specific findings which need not be repeated here. It must be noted, however, that two of the General Counsel's witnesses, Suffrecal of Porier and Gunderson of White, who testified forthrightly and without reservation on January 7, were recalled on cross-examination on March 31. On this occasion, confronted for the first time by a representative of the Respondent, their testimony became both evasive and confusing. It was apparent from their conduct on the stand and the hesitancy with which they answered that they were reluctant to testify adversely to the interests of the Respondent, generally regarded as one of the most powerful local labor organizations in the East. I conclude that their testimony

given on January 7 when they were free from any pressures, however imaginary in nature, was truthful. I also base this finding on the fact that this testimony corroborates and fits the pattern of the testimony of other witnesses for the Charging Party whom I have credited in full and who did not weaken under cross. Apart from these two, the General Counsel's witnesses were forthright and credible on both direct and cross-examination.

I might also note that much of the testimony of the witnesses called by Respondent was confusing if not evasive and that no specific finding can be made on much of it.

Where I have credited the testimony of a witness as to a specific conversation I have, *a fortiori*, discredited testimony of other witnesses which was contradictory whether or not such a specific finding has been made.

2. Violations of Section 8(b)(4)(B)

The complaint, paragraphs 7(a) and (b), alleges that the conduct of Respondent as above set forth, *supra*, had among it objects the forcing of Chicago Bridge, Porier and White to cease doing business with White. There is not a scintilla of evidence to support these allegations. On this record Respondent may be found to have two objectives, (1) to force Burns and White to agree to Local 825's contract in violation of the Board's Order in the *Building Contractors'* case, *supra*, and (2) to force White to assign the operation of the welding machine to its members. Neither objective would have been furthered by a general cessation of business among the parties. Local 825 never made any request upon Chicago Bridge, Porier or White to cease doing business with Burns. Such a request would have been totally irrational for it would have

simply forced Burns to employ other subcontractors which, with the possible exception of White, would not have furthered either interest of the Respondent. But Respondent never indicated it wanted White off the job—it wanted to harass White to gain compliance with its requests. Nor was any demand made upon Burns to cease doing business with White. Respondent never suggested that cancellation of the contract would have served its purpose. It did inform Burns, through persons I have found to be its agents, that the failure of Burns and White to sign contracts and the assignment of the work on the job were the sources of the dispute. All Respondent wanted was the work, not a substitution of contractors nor a termination of contractual relationships between the contractors.

The General Counsel attempts to distinguish this case from *Local 825, International Union of Operating Engineers, AFL-CIO (Nichols Electric),* 138 NLRB 540, enfd. denied, 326 F. 2d 218 (C. A. 3), by stating "there is ample evidence to show Respondent sought these objectives." The brief, which is characterized elsewhere by specificity, give no citation of fact or testimony to support this conclusion and a search of the record reveals no testimony to support it.[17] Neither the General Counsel or any other counsel should so mislead a Trial Examiner. In this case it was necessary for the Trial Examiner to waste his time in a painstaking recheck of the record in search of this alleged "ample evidence." Attorneys for the General

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[17] The Board has, however, specifically supported misleading briefs on the part of the General Counsel and has reprimanded a Trial Examiner for calling attention to one in *S. Klein's Department Stores, Inc.*, 149 NLRB 466.

Counsel should regard themselves as bound by the Canon of Ethics of the American Bar Association and it is lamentable that the admonition of a distinguished attorney to his junior associates that they would meet no more unscrupulous adversary in court than counsel for the Government should ever find support.[18]

3. Violations of Section 8(b)(4)(D)

The Respondent has failed to file a brief in this case so its contentions and defenses are subject to speculation on the part of the Trial Examiner. Based solely on the lines of interrogation taken by counsel for the Respondent upon examination of its witnesses and cross-examination of the General Counsel's witnesses I find those defenses to be.

(1) That the work stoppages, at least those of October 1 and 7, were neither authorized nor directed by the Respondent but were spontaneous on the part of the employed members themselves in resentment of the fact that there were no contracts between White and Burns and that operation of the welding machine had been assigned to the Ironworkers.

(2) That the award of the work on the welding machine to the Ironworkers was invalid in that the dispute was submitted to the Board by Burns and not by White and that Burns was not a party to the dispute.

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[18] Apart from this the case was ably tried and ably briefed by counsel for the General Counsel and as to this specific criticism it must be remembered that counsel operate under direction.

(3) That the work traditionally and historically had been performed by Operating Engineers and not by the Ironworkers.

(4) That the Ironworkers had made no claim to the work.

This proceeding does not follow a Section 10(k) hearing but is brought pursuant to the "Alternative Procedure" as set forth in the Board's Rules and Regulations, Series 8, as amended, Section 102.93. This section reads:

> Sec. 102.93 Alternative procedure.—If, either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the act is occurring or has occurred, he may issue a complaint under section 102.15, and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall insofar as applicable, govern; and sections 102.90 to 102.92, inclusive, are inapplicable.

Appendix A

It has been found that on October 6, 1965, Burns submitted the dispute respecting work on the welding machine to the Joint Board and that on October 19 the Board decided not to disturb the assignment of this work to the Ironworkers. On October 20 it so notified the parties. Burns, White[19] and Local 825 were both bound by Joint Board rulings.

At the hearing the Trial Examiner made certain rulings which are hereby affirmed. He stated that he would not examine the procedures before the Joint Board or determine whether or not Burns was entitled to submit the dispute to that Board. Since all parties appeared the Examiner felt that this issue could not be raised in the instant proceeding. Neither would the Examiner permit the merits of the assignment to be attacked in this proceeding. Whether the work had been traditionally performed by Operating Enginers was not an issue before

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[19] The contract between Burn and White contained the following clause:

Article 31 Labor Relations

> The subcontractor shall be responsible for its own labor relations with any trade or Union representing his employees and he shall negotiate and seek to adjust all disputes between himself and his employees or anyone representing such employees. The same responsibility shall extend to the Lower Tier subcontractors. All contractors in lower Tier subcontractors shall in the settlement of any jurisdictional dispute be bound by the Rules and Procedures of the National Joint Board where the settlement of jurisdictional disputes and shall make assignments in accordance with such Rules and Procedures.

Escher testified that White had in the past submitted jurisdictional disputes to the Joint Board.

the Trial Examiner since this was not a 10(k) proceeding. These rulings would eliminate defenses (2) and (3), *supra.*

The fact that the Ironworkers had made no claim to work is equally irrelevant. As the court said in *Carpenters et al.* v. *C. J. Montag & Sons,* 335 F. 2d 216, 221 (C.A. 9):

> The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union uses forbidden tactics to in an effort to get them, or some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present.

The crux of this case lies in the contention that the work stoppages were not authorized by Local 825. As to the work stoppage of October 1, I would find that the General Counsel has not sustained his burden of proof to show that this stoppage was authorized or directed by Local 825 or its agents.

There is nothing in the record to indicate that either Bonatz, Behrend, or Illario were not conveying to Willis the feeling of the men when they advised him that there would be a stoppage on October 1 if Burns did not sign a contract. Whether this feeling had been generated among the men by the agents of Local 825 is open to question but there is insufficient evidence to support such an inference. Among the major difficulties in resolving issues in labor-management relations disputes is the fact that most decisions, both by labor and management, are made *in camera* and full disclosure of the motives of decisions so reached is seldom, if ever given. If the mo-

tive is unlawful the more realistic term is never. If simple truthfulness and honesty were ever to prevail the decisional-making process would be an easy one, but truthfulness and honesty are not commonly found when a party is charged with violations of the Act. If people were honest there would be telephones at racetracks. A fact not disputed which supports the conclusion reached is that Behrend reported the walkoff to Newark on the morning of October 1 and that shortly thereafter he was ordered by Weber to get the men back to work. I do not view this walkout without suspicion but resort must be taken to the familiar cliche that suspicion is not proof.[20]

A different conclusion must be reached as to the walkout on October 7. I have credited the testimony of Willis that late in the afternoon of October 6 he was approached by Bonatz and Illario and told that unless an engineer was assigned to the welding machine the men would not work. Suffrecal of Porier was told by his lead engineer, Behrend, on October 6 that he might or might not have men working the next day. Langlinais of Chicago Bridge was told by Bonatz on October 8 that the stoppage was the direct result of the failure of White to assign the welding machine to the members of Local 825. Unlike the work stoppage of October 1 none of Local 825's agents testified that the stoppage was the result of a vote of the members.[21] Since this is that kind of case in which the

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[20] As the court stated in *N.L.R.B.* v. *Local 217, Plumbers, etc. (The Carvel Company)*, 62 LRRM 2257, decided May 26, 1966 (C.A. 1), there is no violation unless the employees are induced and a totally self-generated cessation of work would not be proscribed.

[21] While Behrend testified that he did not tell the men to walk off on October 6 and that he believed the walkout was the result of the vote taken a week earlier his testimony is far from conclusive.

issues must, for the most part, be decided on rather tenuous inferences I find, in view of the warnings given by union representatives, that the walkout was authorized.[22] It is true that these same representatives gave the same warnings of a prospective walkout on October 1 but those warnings were accompanied by statements that the members were making the decision. The warnings which related to the walkout of October 6 did not attribute the decision to the men. It does not seem likely that members of a well disciplined union (and this characterization is based on a review of Board decisions involving Local 825 and this Examiner's recollection of testimony in four cases which he heard in which Local 825 was the Respondent) would again strike on their own initiative after having been ordered back to work on October 1, an order with which they immediately complied.

The motive for the walkout on November 4 is manifest. We have a history of the dispute between Local 825 and the two Charging Parties by that date going back to the time the machine was first installed at Oyster Creek. More importantly we had the jobsite meeting with Weber on October 26 in which Weber told Kylberg that the Joint Board's assignment was all wrong and that the assignment of the welding machine operation meant a great deal to him, a statement which was accompanied by thinly veiled threats to impose burdensome conditions on White. When the machine was first operated by an ironworker on November 4, White's four engineers promptly ceased work and surrounded the machine. At or about the time

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[22] The inference relates only to the authorization of the walkout. The purpose of the walkout was clearly stated by Local 825's agents.

the engineers ceased work Bonatz went to Gunderson and asked him if White had signed the contract with Local 825.[23] Gunderson told him, "I did not have."

The men did not return to work until after the District Court injunction issued on November 8. Nothing could be clearer than that this walkout was proscribed by Section 8(b)(4)(D) of the Act and that the methods employed were in violation of Section 8(b)(4)(i) and (ii)(D).

Such doubt as might exist that the walkout on November 17, when the concrete pump was to start operating, and the demand for additional engineers to operate the pump is resolved by the credited testimony of Gunderson and Escher. Gunderson testified that while he was disputing the number of engineers required to operate the pump with Illario (Gunderson thought one sufficient while Illario was demanding three). Illario stated that the requirement was more or less due to the electric welding machine dispute. Escher, anxious to get the men back to work, called Weber on December 1 and in the course of a lengthy conversation was told that if he replaced the electric machine with a gasoline welding machine (equipment which would be operated by engineers) and signed a contract, the men would go back. While it may have been no more than a coincidence that the wires on the welding machine were cut and oil poured into its

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[23] This contract, submitted to both Burns and to White (General Counsel's Exhibits Nos. 4 and 10) contains an addendum which includes in the job classifications the work on both gas and electric welding machines as part of the equipment to be operated by members of Local 825. A signing of the contract would therefore accomplish both objectives sought by Respondent—contractual status and the right to operate the machine.

armature on that same day, this coincidence does nothing to diminish the General Counsel's case.

In reaching the conclusion that Respondent violated Section 8(b)(4)(i) and (ii)(D) in these three specific work stoppages as above found I have considered the fact that neither Burns nor White had any difficulties with Local 825 until after the welding machine was brought to the jobsite about September 20. White, without a contract, was able to obtain engineers from Local 825 and there was no hint until after September 20 that the failure to contract would occasion trouble on the job. During this entire period White was engaged on three other projects in New Jersey which were not shut down, another indication that the Oyster Creek problem stemmed from the welding machine.

While the Board (Member Leedom dissenting) has held that the mere giving of notice of prospective strike action against a subcontractor to the prime contractor is not a violation of Section 8(b)(4)(ii)(B), *Local Union No. 83, Teamsters, etc (Marshall & Haas)*, 133 NLRB 1144. I find that case clearly distinguishable from the instant case. In *Marshall & Haas* the prime contractor was not a party to the dispute with the subcontractor and the notice was given to show that the possibility of a stoppage might occur on the job and, presumably, to offer it the chance to settle the dispute. Here Burns was a primary party to the dispute and the threats made to White and the work stoppages were directed to the failure on the part of Burns as well as White to sign a contract. Under such circumstances I find that the threats and coercion directed to White were directed equally to Burns. It was only the fortuitous circumstance that Burns employed no engineers at the jobsite that precluded it from suffer-

ing stoppages. I shall therefore include Burns in the Recommended Order.

IV. The remedy

Having found the Respondent engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

The General Counsel has requested that a Board Order issue in this case in view of prior violations of the Act by Respondent and its failure to comply with Board Orders.[24] I agree and shall recommend an order in the form requested by the General Counsel.[25]

Upon the foregoing findings and conclusions and upon the entire record in this case, I make the following:

Conclusions of Law

1. By inducing and encouraging individuals employed by Chicago Bridge, Porier and White to engage in work stoppages and refusal in the course of their employment to perform any services, by threatening, coercing and restraining Burns, Chicago Bridge, Porier and White with an object in each case of forcing and requiring White to assign the work of operating its electrical welding ma-

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[24] See *Local 825, Operating Engineers,* 145 NLRB 952; *Local 825 Operating Engineers,* 140 NLRB 458; enfd. 326 F. 2d 213 (C.A. 3), *Local 825 Operating Engineers,* 138 NLRB 279; enfd. 332 F. 2d 478 (C.A. 3); *Local 825, Operating Engineers,* 131 NLRB 452; *Local 825, Operating Engineers,* 120 NLRB 545.

[25] *Local 825 Operating Engineers* (United Engineers), 138 NLRB 279.

chine at Oyster Creek to employees engaged as operating engineers who are represented by Respondent and who are not lawfully entitled to such work rather than to employees engaged as ironworkers who were represented by the Ironworkers and were lawfully entitled to such work, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, it is recommended that Local Union 825, International Union of Operating Engineers, AFL-CIO, its officers, agents, representatives, successors and assigns shall:

1. Cease and desist from engaging in, or inducing or encouraging any individual employed by Porier & McLane Corporation, Chicago Bridge & Iron Company, White Construction Company, or by any other persons engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of his employment to perform any services, or from threatening, coercing, or restraining the above-named plus Burns & Roe, Inc., or any other persons engaged in commerce, where an object thereof in either case is to force or require White Construction Company, or any employer, to assign any work to employees engaged as operating engineers who are represented by Respondent rather than to employees represented by another labor organization, except insofar as any such action is permitted under Section 8(b)(4)(D) of the Act.

Appendix A

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its place of business at Newark, New Jersey, copies of the attached notice[26] marked "Appendix."[27] Copies of said notice to be furnished by the Regional Director for the Third Region shall, after having been signed by a duly authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to see that such notices are not altered, defaced or covered by other material. Upon request from the Regional Director, the Respondent shall

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[26] In keeping with Board policy, see *L. L. Glascock, Inc.*, 160 NLRB No. 74, in which the Board revised Examiner Reel's notice to make it unintelligible to the average employee, the attached notice has been drafted with the purpose of similar obfuscation. It might appear, as it seemingly did to the Trial Examiner in *Glascock*, that it would be the policy of the Board to make its decision clear to those most vitally affected by them, which in this instance would include union members as well as the employers. Such is not the case. The operating engineer who understands this notice has missed his vocation. He should be deciphering the Dead Sea scrolls.

[27] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

supply him with a sufficient number of signed copies of said notices for posting by Chicago Bridge, Porier, White and Burns, they willing, at their respective jobsite offices at Oyster Creek and other places of business.

(b) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision and Recommended Order what steps have been taken by Respondent to comply herewith.[28]

(c) It is further recommended that the complaint insofar as it alleges violations of Section 8(b)(4)(i) and (ii)(B) of the Act be dismissed.

Dated at Washington, D. C. 9/28

JOHN F. FUNKE
John F. Funke
Trial Examiner

[28] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX B

Decision and Order of National Labor Relations Board

162 NLRB No. 155

D-9548
Oyster Creek, N. J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-CC-359

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and

BURNS & ROE, INC.

Case No. 4-CD-144

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and

WHITE CONSTRUCTION COMPANY

On September 28, 1966, Trial Examiner John F. Funke issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging

in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and commended that those allegations be dismissed. Thereafter, the Respondent, the General Counsel, and the Charging Parties filed exceptions to the Trial Examiner's Decision and supporting briefs. An answering brief was also filed by the Charging Parties.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,[1] the exceptions, the briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and

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[1] We specifically disavow the gratuitous, injudicious and, wholly unwarranted remarks contained in footnotes 17 and 26 and on page 9 of the Trial Examiner's Decision.

The following inadvertences contained in the Trial Examiner's Decision are hereby corrected: The name "Norton" is changed to "Wharton" (p. 8, line 22); the correct spelling of one of the employers herein is Poirier; paragraph 7(a) of the complaint refers to the forcing of Chicago Bridge, Poirier, and White to cease doing business with Burns, and paragraph 7(b) refers to the forcing of Burns to cease doing business with White (p. 9, lines 8-10); the words "Board Order" are changed to "broad Order" (p. 13, line 46).

recommendations of the Trial Examiner, insofar as they are consistent with this Decision and Order.

1. We agree with the Trial Examiner that the Respondent violated Section 8(b)(4)(i) and (ii)(D) of the Act, because it was responsible for three separate work stoppages,[2] with an object of forcing White Construction Company, herein called White, to assign work on its electric welding machine to engineers, who are members of Respondent, rather than to ironworkers who are members of Local 350, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, herein called the Ironworkers.[3] With regard to an earlier work stoppage which occurred on October 1, 1965, and had the same proscribed object, the Trial Examiner found that there was sufficient evidence to hold the Respondent responsible for the strike. We do not agree.

Burns & Roe, Inc., herein called Burns, is a general contractor for Jersey Central Power and Light Company, which is constructing a nuclear power generator plant at Oyster Creek, New Jersey. Certain construction work was

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[2] These strikes, which lasted from a few days to several weeks, began on October 7, November 4, and November 16, 1965.

[3] On October 19, 1965, the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry, herein called the Joint Board, after a proceeding in which all parties participated, issued an award confirming White's assignment of the disputed work to the ironworkers. The complaint herein was issued by the Regional Director for Region 4 in accordance with Section 102.93 of the Board's Rules and Regulations, Series 8, as amended, after the Respondent failed to comply with the aforesaid award. See *Electrical Workers Local 26 (McCloskey & Co.)*, 147 NLRB 1498, 1502-3.

subcontracted by Burns to White, Chicago Bridge & Iron Co. (herein called Chicago Bridge), and Poirier & McLane Corporation (herein called Poirier). These subcontractors employ operating engineers, ironworkers, carpenters, and laborers. Burns has no construction employees on the job. All the operating engineers on the project are members of the Respondent, which has bargaining contracts with Chicago Bridge and Poirier, but not with Burns and White. Prior to 1963, Burns and White, who are members of Building Contractors Association of New Jersey, were covered by a multi-employer bargaining contract with the Respondent. In January 1964, this Board found the Repondent in violation of Section 8(b)(1)(B) and (3) of the Act for attempting to bargain unilaterally with the individual members of the Association.[4]

As detailed in the Trial Examiner's Decision, during the days immediately preceding October 1, 1965, on which date all the operating engineers employed by White, Chicago Bridge, and Poirier engaged in a work stoppage, Bill Bonatz, Hank Behrend, and Bobbie Illario, agents of the Respondent, were involved in the conduct described below.

In the latter part of September, Chris Gunderson, White's construction superintendent, was approached by Bonatz and Behrend and told that an engineer would be required to push the buttons which operated an electric welding machine recently installed by White on the job.

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[4] *International Union of Operating Engineers, Local 825, et al. (Building Contractors Association of New Jersey)*, 145 NLRB 952, enfd. by consent decree entered by the U. S. Court of Appeals for the Third Circuit on August 5, 1966, in Case No. 22-CB-538 (1-2).

site. After Gunderson checked with his office and was informed that this work had been assigned to White's ironworkers who were to perform the actual welding, he relayed this information to Bonatz and Behrend. On September 30, Bonatz and Behrend again approached and told Gunderson that they were going "to knock the engineers off the crane", and they gave Gunderson three copies of a proposed agreement for White to sign. On that date, the engineer and oiler on the crane stopped work at 10 a.m. and did not return to work until about 1 p.m. on October 1.

On September 29, 1965. Giles Willis, resident construction manager for Burns, was visited by Bonatz and Behrend and told that members of the Respondent employed by subcontractors on the job had taken a vote to cease work unless Burns signed a contract with Respondent. On the next day, Bonatz, Behrend, and Illario approached Willis, who was given copies of the above-mentioned proposed contract and told that, unless Burns signed the contract by the following morning, all the operating engineers would walk off the job. On October 1, at 8 a.m., the same three agents again met Willis and asked if Burns had signed the contract.[5] When Willis replied in the negative, they left his office and proceeded to the parking lot outside the gate and engaged in conversations with the engineers who had gathered there. The engineers, who were employees of White, Chicago Bridge, and Poirier, did not report for work until 1 p.m.

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[5] The contract sought from White and Burns provided for Respondent's members to perform the disputed work. The contract also provides that any employer who becomes a party thereto could not subcontract any work covered by the agreement unless the subcontractor agreed in writing to perform all work subject to the terms and conditions of the agreement.

Appendix B

The Trial Examiner viewed the October 1 work stoppage as spontaneous conduct on the part of the engineers and found that the General Counsel did not sustain his burden of proof to show that the strike was authorized or directed by the Respondent. In our opinion, the preponderance of record evidence requires a finding that the Respondent induced and encouraged the engineers to engage in the strike. Thus, Behrend presided at a meeting of all engineers employed on the project which was held on the jobsite a few days prior to October 1. A unanimous vote was taken to strike because of White's refusal to assign the welding machine work to an engineer and because neither White nor Burns had contracts with the Respondent. Bonatz and Illario were also present at this meeting. Thereafter, there were requests that the work be performed by Respondent's members and threats of work stoppage were made by Respondent's agents. Immediately before the stoppage of October 1, Bonatz, Behrend, and Illario talked to the engineers assembled at the parking lot.[6]

Upon the foregoing facts and the entire record, we find that a preponderance of evidence establishes that the Respondent, with an object to force or require White to as-

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[6] Behrend testified that, after the strike began, he reported it to the Respondent's office and that shortly thereafter he received a message from an unidentified indivdual at that office that "there was some kind of negotiations going on and to get the men back on the job right away". It also appears that the Joint Board was notified of the dispute by telegram immediately after the strike began and the Joint Board requested the general president of International Union of Operating Engineers to direct the Respondent local union to have the men return to work immediately, pending an adjustment of the dispute.

sign the disputed work to engineers represented by the Respondent, induced on encouraged employees employed by White, Chicago Bridge, and Poirier to engage in a work stoppage on October 1, 1965, and threatened, restrained, or coerced Burns and these other employers, all in violation of Section 8(b)(4)(i) and (ii)(D) of the Act.

2. Contrary to the Trial Examiner, we find, that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by its work stoppages of October 1 and 7, 1965, as alleged by the complaint in Case No. 4-CC-359.[7]

We have found that the Respondent was responsible for the strike of October 1, and in agreement with the Trial Examiner, we have found the Respondent also responsible for the strike of October 7.[8] It is clear that Respondent's

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[7] Member Fanning dissents from this finding. His view, expressed in *Local 5, Plumbers Union (Arthur Venneri Company)*, 137 NLRB 828, 834, and 145 NLRB 1580, 1601, and recently in *Millwrights Local Union 1102 (Dobson Heavy Haul, Inc.)*, 162 NLRB No. 6, is that the finding herein that a jurisdictional dispute exists in these consolidated cases precludes a finding that the Respondent's conduct for the purpose of resolving this dispute is also violative of Section 8(b)(4)(B). But see the contrary position taken by a majority of the Board in *Venneri* and *Dobson*, and the recent opinion in *Local 25, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)*, 162 NLRB No. 63, wherein the Board found violations of 8(b)(4)(B) and (D) in a consolidated proceeding.

[8] With regard to the strike which began on October 7, the evidence shows that on October 6, the Respondent threatened Willis and Telghman Suffrecal, representatives of Burns and Poirier, respectively, with a strike, and that Langlinais, project manager

(*Footnote continued on following page*)

strike threats and strikes were in furtherance of the Respondent's primary dispute with White who refused to reassign the welding machine work to engineers represented by the Respondent.[9] It is equally clear that the Respondent sought to achieve the assignment of this disputed work by applying economic pressure on neutrals to the dispute—Burns, the general contractor, and subcontractors Chicago Bridge and Poirier—with an object of causing a disruption of the business relationship among the various employers at the jobsite.[10] Unlike the Trial

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(*Footnote continued from preceding page*)

for Chicago Bridge, was told by the Respondent after the strike was under way that it resulted from the welding machine dispute. Employees of Poirier and Chicago Bridge, engaged in a work stoppage between October 7 and 11. These employees had also ceased work on October 1.

The work stoppages which began on November 4 and 16, 1965, were confined to employees of White, with whom the Respondent had a primary dispute, and are not alleged as violations of Section 8(b)(4)(B).

[9] The General Counsel has argued that the Respondent also had a primary dispute with Burns arising out of the latter's refusal to sign a contract with Respondent, and that White, Poirier, and Chicago Bridge were neutrals enmeshed in that dispute, but we perceive no useful purpose for deciding whether a violation should be predicated upon that theory. We note, however, that the apparent purpose of Respondent's request for a contract from Burns was to obtain the disputed work from White.

[10] See *Local 25, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company), supra*; *Millwrights Local Union 1102 (Dobson Heavy Haul, Inc.), supra*; *Local 1291, International Longshoremen's Association et al. (Pennsylvania Sugar)*, 142 NLRB 257, 261, enfd. 332 F. 2d 559 (C.A. 3).

Examiner, who found the object proscribed by Section 8(b)(4)(B) to be a literal cessation of business, the Board has held that an object such as the Respondent's herein, although something less than a total cancellation of a business relationship, constitutes a "cease doing business" object within the meaning of this section of the Act.[11] Here, therefore, within the meaning of the statute, an object of the Respondent was to force Burns to cease doing business with White, and to force Chicago Bridge and Poirier to cease doing business with Burns in order to compel Burns to cease doing business with White.

3. We agree with the Trial Examiner's recommendation that a broad cease and desist order is required to remedy the Respondent's unfair labor practices found violative of Section 8(b)(4)(D) of the Act. In addition to the work stoppages which stemmed from White's assignment of work, the Respondent has also been involved in jurisdictional disputes concerning the assignment of work by other employers on the Oyster Creek project and has been enjoined by the Court from engaging in other work stoppages on this project.[12] Therefore, until all building and

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[11] *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)*, 140 NLRB 729, 730; *Local 1291, International Longshoremen's Association et al. (Pennsylvania Sugar), supra.*

[12] *Bernard Samoff, Regional Director, et al.* v. *Local No. 825, International Union of Operating Engineers, AFL-CIO*, Civil No. 66-66, consent decree entered on February 1, 1966, by U. S. District Court for the District of New Jersey. See also this Board's Decision and Determination of Dispute, *Local 825, IUOE (Utilities Line Construction Co., Inc.)*, 159 NLRB No. 131.

construction work at the Oyster Creek project is completed, we shall order the Respondent to cease and desist from forcing or requiring White or any other employer engaged on the project to assign any work to employees represented by the Respondent rather than to employees represented by another labor organization, except insofar as permitted by Section 8(b)(4)(D) of the Act.

Having found that the Respondent has also engaged in violations of Section 8(b)(4)(B) and because of the Respondent's demonstrated proclivity to engage in unlawful secondary activities, as noted in the Trial Examiner's Decision, we shall issue a broad cease and desist order to prevent the Respondent from committing future violations in its disputes with White and other primary employers.[13]

Additional Conclusions of Law

1. By inducing and encouraging the employees of Chicago Bridge and Poirier to engage in work stoppages, and by threatening, coercing, and restraining these employers and Burns with an object in each case of forcing or requiring Chicago Bridge and Poirier to cease doing business with Burns, and with a further object of forcing or requiring Burns to cease doing business with White, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[13] See *Local 825, International Union of Operating Engineers, AFL-CIO (United Engineers & Constructors, Inc.)*, 138 NLRB 279, 280, enfd. 332 F. 2d 478 (C.A. 3).

Appendix B

Order

Upon the entire record in these cases and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local No. 825, International Union of Operating Engineers, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Chicago Bridge & Iron Co., Poirier & McLane Corporation, or any other person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform any services; or threatening, coercing, or restraining Chicago Bridge & Iron Co., Poirier & McLane Corporation, Burns & Roe, Inc., or any other person engaged in commerce or an industry affecting commerce, where, in either case, an object thereof is to force or require Chicago Bridge & Iron Co., Poirier & McLane Corporation, or any other person, to cease doing business with Burns & Roe, Inc., or any other person, or to force or require Burns & Roe, Inc., or any other person to cease doing business with White Construction Company, or any other person.

(b) Engaging in, or inducing or encouraging any individual employed by White Construction Company, Chicago Bridge & Iron Co., Poirier & McLane Corporation, or any other person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform any services; or threatening, coercing, or restraining White Construction

Company, Chicago Bridge & Iron Co., Poirier & McLane Corporation, Burns & Roe, Inc., or any other person, where, in either case, an object thereof is to force or require White Construction Company, or any other person engaged on the Oyster Creek, New Jersey, project, to assign any work to employees who are represented by the Respondent, rather than to employees who are represented by another labor organization, except insofar as any such action is permitted under Section 8(b)(4)(D) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix".[14] Copies of said notice, to be furnished by the Regional Director for Region 4, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail copies of said notice to the Regional Director for posting by White Construction Company, Chicago Bridge & Iron Co., Poirier & McLane Corpora-

[14] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

tion, and Burns & Roe, Inc., these companies willing, at all locations where notices to their respective employees are customarily posted.

(c) Notify the Regional Director for Region 4, in writing, within 10 days from the date of this Decision, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., Feb. 13, 1967.

FRANK W. MCCULLOCH,
Chairman

JOHN H. FANNING,
Member

GERALD A. BROWN,
Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

Opinion of the United States Court of Appeals

(Filed April 25, 1969.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17180

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondent.

BURNS AND ROE, INC., AND WHITE CONSTRUCTION COMPANY,
Intervenors.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued December 5, 1968

Before: HASTIE, Chief Judge and KALODNER, *Circuit Judge.*

By HASTIE, Chief Judge.

This case is before us on a petition of the National Labor Relations Board for enforcement of a cease and desist order based upon the Board's finding that the respond-

ent, Local 825, International Union of Operating Engineers, violated section 158 (b)(4)(D) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(D), by coercing White Construction Co., an employer, with the object of compelling White to assign the starting and stopping of an electric welding machine to operating engineers represented by Local 825 rather than to the ironworkers who used the machine and were represented by Ironworkers Local 350. The Board also found that in connection with the same controversy Local 825 had violated section 8(b)(4)(B) of the Act by conduct in the nature of a secondary boycott against other employers in an effort to compel them to cease doing business with White. This conduct also was interdicted by the cease and desist order.

The Board's factual findings relevant to the alleged section 8 (b)(4)(D) violation are adequately supported by the record. It appears that White undertook as a subcontractor to construct the reactor building for a projected nuclear power plant. In the course of the job White assigned to its ironworker employees the work of starting and stopping an electric welding machine that they used in welding structural steel. At that time White had no contract with Local 825 though White's work force included two members of that union, an engineer and an oiler who operated a crane.

At this juncture a representative of Local 825 demanded that White employ a member of that Union to push the buttons that started and stopped the welding machine. When White failed to comply and to sign an agreement giving Local 825 jurisdiction that would include electric welding machines, the crane engineer and oiler stopped work for one day. More prolonged work stoppages by the engineers occurred during the ensuing weeks. The

Board found the union responsible for these work stoppages and the record fully supports that conclusion.

Both Local 825 and the Ironworkers' Union were obligated by contract with the Building Trades Employers' Association to recognize the jurisdiction of the National Joint Board for the Settlement of Jurisdictional Disputes and "to be bound by all decisions and awards" made by that body in exercise of its agreed jurisdiction. Accordingly, the matter of the work claimed by Local 825 in connection with the use of electric welding equipment was referred to the Joint Board. That Board issued an award confirming White's assignment of the work in question to the ironworkers.

Although in its answer to the complaint in this case Local 825 admitted that it was bound, as its contract with the Employers' Association provided, by the award of the Joint Board, it refused to respect the award when it was made. Rather, it persisted in its demand that the disputed work be assigned to operating engineers and in its coercive tactics to enforce that demand. This unfair labor practice proceeding followed.

The union asserts two principal defenses; first, that there was no such claim by the ironworkers to the work in question as would create a jurisdictional dispute; and second, that the present unfair labor practice decision is invalid because it was not preceded by and grounded upon a Board award of the claimed work to a particular craft in a section 10(k) proceeding, 29 U.S.C. § 160(k).

The contention that there were no conflicting claims creating a jurisdictional dispute is without merit. The employer's original assignment of ironworkers to start and stop the electric welding machines they were to use may

well have been made routinely without any demand by those employees or their union. However, they did accept this work as an incident of their job. This entire dispute grows out of that work assignment and its acceptance.

More important, the Ironworkers Union and the Union of Operating Engineers were opposing parties in the ensuing proceeding before the Joint Board to determine which craft should perform the work in question. The Ironworkers prevailed thereby establishing their right to the work under the procedure agreed to by all of the parties. Thereafter, ironworkers performed the work as a matter of established right. And they have not disclaimed that right. In these circumstances, it is specious to argue that the persisting demand of the operating engineers that the work be assigned to them does not create a jurisdictional dispute. *Cf. N.L.R.B.* v. *Local 1291 International Longshoremen's Ass'n* 3d Cir. 1966, 368 F. 2d 107; *N.L.R.B.* v. *Local 25, International Brotherhood of Electrical Workers*, 2d Cir. 1967, 383 F. 2d 449. "The fact that one union has the jobs and holds on to them in a polite, non-belligerant manner while the other union uses the forbidden tactics in an effort to get them, or some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present." *International Brotherhood of Carpenters* v. *C. J. Montag & Sons, Inc.*, 9th Cir. 1964, 335 F. 2d 216, 221.

The respondent's second contention is that this unfair labor practice proceeding is premature because the Board did not first utilize a proceeding under section 10(k) of the Act to make a decisive award of the work to one craft or the other.[1]

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[1] Whether this contention should fail here because it was not advanced before the Board, we do not decide.

Appendix C

In most cases a Board award under section 10(k) and a refusal to abide by that award must precede an unfair labor practice proceeding based on a jurisdictional dispute. *N.L.R.B.* v. *Radio and Television Broadcast Engineers, Local 1212* (*C.B.S.*), 1961, 364 U. S. 573; *N.L.R.B.* v. *United Ass'n of Journeymen*, 3d Cir. 1957, 242 F. 2d 722. However, we agree with the Board that in the circumstances of this case a section 10(k) proceeding was not necessary. That section reads as follows:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

It will be observed that the statute expressly provides for the discontinuance of a section 10(k) proceeding where the parties show that they have "agreed upon methods for the voluntary adjustment of the dispute". The present parties had agreed in advance upon a method of voluntary adjustment and did in fact utilize that method in this case. We cannot believe that Congress intended to require a section 10(k) proceeding after a binding voluntary settlement of a dispute when the legislative scheme pro-

vides for the discontinuance of a section 10(k) proceeding if such an adjustment shall occur during its pendency. *Wood, Wire and Metal Lathers Union (Acoustical Contractors)*, 1958, 119 N.L.R.B. 1345, cited with approval, *Carey* v. *Westinghouse Corp.*, 1963, 375 U.S. 261, 264 n.4. Indeed, in the present circumstances a section 10(k) proceeding would be a pointless formality. For having agreed to the settlement of jurisdictional disputes by the Joint Board and having experienced an adverse ruling in this case, Local 825 is in no position to challenge the merits of that ruling before another tribunal. *Cf. Electrical Workers Local 26 (McCloskey & Co.)*, 1964, 147 N.L.R.B. 1498.[2]

Accordingly, we conclude that a violation of section 8 (b)(4)(D) has been properly established.

Different issues arise under the charge of secondary boycott in violation of section 8(b)(4)(B). This charge involves contractors additional to White. Burns & Roe, Inc., was the general contractor for the entire nuclear power plant project. It subcontracted all of the construction work and thus had no construction employees. Chicago Bridge & Iron Co. and Poirier & McLane Corp.,

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[2] In an effort to avoid this conclusion the respondent has cited cases in which a section 10(k) hearing has been required after some third party has decided that one union rather than the other should be assigned the disputed work. *E.g., International Union of Operating Engineers, Local 520 (Biebel Bros.)*, 1968, 170 N.L.R.B. No. 38; *Plasterers Local Union 79*, 1967, 167 N.L.R.B. No. 23; *Albany Printing Pressmen*, 1967, 166 N.L.R.B. No. 71; *United Industrial Workers, Seafarers (Albin Stevedore Co.)*, 1967, 162 N.L.R.B. No. 96. But in none of these cases was the decison of the third parties one by which the parties were bound, whether by contractual agreement or otherwise.

as well as White, were subcontractors working at the project site. The Board's conclusion that section 8(b)(4)(B) had been violated was based on findings that the respondent had coerced Burns and its subcontractors other than White in an effort to force Burns to "cease doing business" with White.

The record amply justifies the conclusion that these contractors were subjected to coercion in the form of threats or walkouts or both. The debatable issue is whether the object of this coercion was to force Burns to "cease doing business" with White within the meaning of section 8(b)(4)(B).

It was not the Board's theory, nor does it seem seriously to be contended that the respondent sought to compel Burns to stop using the services of White or to terminate its contract with White. Indeed, such action would not have been advantageous to the respondent. Rather, it is said that the respondent undertook to "disrupt the business relation" between Burns and White so that the contractor would try to induce the subcontractor to comply with the respondent's demands. The question is whether conduct so intended seeks to compel the one contractor to "cease doing business" with the other within the meaning of section 8(b)(4)(B).

We considered a similar situation in *N.L.R.B.* v. *Local 825, International Union of Operating Engineers,* 3d Cir. 1964, 326 F. 2d 218, and concluded that the finding of a "cease doing business" objective was not warranted. It is now urged that this case is distinguishable from that one because in the earlier case the work stoppages, though to the neutral employer's detriment, were not attended by any communication of the union with that employer. How-

ever, the disruption of the neutral employer's business activity in connection with the primary employer and the objective of exerting pressure upon the primary employer through the neutral one was essentially the same there as here. Indeed, we quoted but did not approve the Board's finding:

> '". . . Even, assuming, *arguendo,* that Respondent merely intended by its strike to force Selby and Elmhurst to require Nichols to change its method of operation, this in itself would have disrupted or seriously curtailed the existing business relationship between Nichols and these two other contractors, which would have been tantamount to causing the latter employers to cease doing business with Nichols."' 326 F. 2d at 220.

Moreover, in neither case did the union admit a "cease doing business" objective was, but rather in both cases the circumstances compelled the inference that the union wanted the contractor to use its influence with the subcontractor to change the subcontractor's conduct, not to terminate their relationship.

Accordingly, following our earlier decision, we hold that proof of coercive activity amounting to "disruption of a business relationship" and aimed at causing a neutral employer to put pressure on the primary employer is insufficient, without more, to establish an effort to compel the one employer to "cease doing business" with the other. The language of section 8(b)(4)(B) is apt to prohibit the classical secondary boycott where the attempt is made to coerce the primary employer by compelling others to stop trading or otherwise dealing with him. But we think the

"cease doing business" language is not apt to cover the objective proved here, however objectionable or deserving of condemnation it may be. *But cf. N.L.R.B.* v. *Carpenters District Council of New Orleans and Vicinity, AFL-CIO*, 5th Cir., No. 25408, decided February 19, 1969. We think it is for Congress to broaden the language of section 8(b)(4)(B) if it desires to cover such situations as this.

Finally, we consider objections of the respondent to the breadth of the Board's cease and desist order.

Paragraph 1(a) of the order restrains violations of section 8(b)(4)(B). That subparagraph will not be enforced because no violation of section 8(b)(4)(B) has been established.

An understanding of the controversy concerning the reach of paragraph 1(b) of the order requires quotation of that subparagraph in full. It prohibits the respondent from

> "(b) Engaging in, or inducing or encouraging any individual employed by White Construction Company, Chicago Bridge & Iron Co., Poirier & McLane Corporation, or any other person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform any services; or threatening, coercing, or restraining White Construction Company, Chicago Bridge & Iron Co., Poirier & McLane Corporation, Burns & Roe, Inc., or any other person, where, in either case, an object thereof is to force or require White Construction Company, or any other person engaged on the Oyster Creek, New Jersey, project, to assign any work to employees

who are represented by the Respondent, rather than to employees who are represented by another labor organization, except insofar as any such action is permitted under Section 8(b)(4)(D) of the Act."

We read this language as covering any jurisdictional dispute which may arise in connection with the performance of any contract or subcontract on the present nuclear power plant project, so long as the Board has not determined that members of a particular union craft are entitled to the work in question. To enforce this order would mean that, in any such case, the respondent would be guilty of contempt if by any coercive means it should seek a resolution of a jurisdictional dispute in its favor. The vice of this, the respondent argues, is that the union is forced to accept whatever work assignment the employer may make. For, under the scheme of the Act, the Board will not entertain a section 10(k) proceeding to resolve a jurisdictional dispute unless it has reason to believe that a union is engaging in the very kind of activity which under the Board's order would be contempt of court. See *Local 478, International Union of Operating Engineers,* 1968, 172 N.L.R.B. No. 221.

We think the union's argument, whatever validity it might have in some cases, overlooks an important circumstance in this case. The contractors and the labor organizations in the building trades involved in this project have voluntarily agreed to the adjustment and resolution of jurisdictional disputes through resort to and decision by the Joint Board. Just as a contractor took the present dispute to the Joint Board, the respondent is free to take any similar future dispute concerning the assignment of work on the project to the Joint Board. The proposed decree

would not in any way interfere with the utilization of that agreed method of settling jurisdictional disputes. Only if any employer should refuse to comply with a Joint Board award might the proposed order's prohibition of coercive action unfairly restrain the respondent. Accordingly, we think appropriate language should be added at the end of the order to except from its prohibition coercive action aimed at enforcement of a Joint Board decision. *Cf. Local 26, International Fur Workers, (Winslow Bro. & Smith Co.),* 1950, 90 N.L.R.B. 1379. But, with that minor modification, we conclude that paragraph 1(b) of the Board's order does not overstep that broad administrative discretion in fashioning appropriate remedies which we have repeatedly recognized. *E.g. N.L.R.B.* v. *Local 542, International Union of Operating Engineers,* 3d Cir. 1964, 329 F. 2d 512; *N.L.R.B.* v. *Highway Truck Drivers and Helpers, Local No. 107,* 3d Cir. 1962, 300 F. 2d 317. In reaching this conclusion we have considered the respondent's persistent disposition to violate the provisions of section 8(b)(4) as demonstrated by the numerous cases in which this court has found it necessary to enforce Board orders against it and at least two cases in which we have found it necessary to invoke our contempt power to obtain the respondent's compliance with our orders.[3]

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[3] *E.g., N.L.R.B.* v. *Weber,* 3d Cir. 1967, 382 F. 2d 387; *N.L.R.B.* v. *Local 825, I.U.O.E.,* 3d Cir. 1964, 326 F. 2d 213; *N.L.R.B.* v. *Local 825, I.U.O.E.,* 3d Cir. 1963, 322 F. 2d 478; *N.L.R.B.* v. *Local 825, I.U.O.E.,* 3d Cir. 1963, 315 F. 2d 695.

In addition, this court has found it necessary in one case to adudge Local 825 in contempt for refusal to comply with our decree enforcing a Board order. *N.L.R.B.* v. *Local 825,* No. 14,331 Order of June 18, 1964. A second such proceeding is pending at Nos. 17,091 and 17,092.

Appendix C

The order of the Board, modified and restricted in accordance with this opinion, will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17180

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondent,

BURNS AND ROE, INC., AND WHITE CONSTRUCTION COMPANY,
Intervenors.

Before:

HASTIE, CHIEF JUDGE and KALODNER, CIRCUIT JUDGE.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated February 13, 1967, against the above-named Respondent, its officers, agents, and representatives. The Court heard argument of respective counsel on December 5, 1968, and has considered the briefs and transcript of record filed in this case. On April 25, 1969, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's order as modified. In conformity therewith, it is hereby

Appendix D

ORDERED AND ADJUDGED by the Court that the Respondent, Local No. 825, International Union of Operating Engineers, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by White Construction Company, Chicago Bridge & Iron Co., Poirier & McLane Corporation, or any other person engaged in commerce or an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform any services; or threatening, coercing, or restraining White Construction Company, Chicago Bridge & Iron Co., Poirier & McLane Corporation, Burns & Roe, Inc., or any other person, where, in either case, an object thereof is to force or require White Construction Company, or any other person engaged on the Oyster Creek, New Jersey, project, to assign any work to employees who are represented by the Respondent, rather than to employees who are represented by another labor organization, except insofar as any such action is permitted under Section 8(b)(4)(D) of the Act, and except insofar as such action is aimed at enforcement of a decision of the National Joint Board for Settlement of Jurisdictional Disputes.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix". Copies of said notice, to be furnished by the Regional Director for Region 4, (Philadelphia, Pennsylvania), shall, after be-

ing duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail copies of said notice to the Regional Director for posting by White Construction Company, Chicago Bridge & Iron Co. Poirier & McLane Corporation, and Burns & Roe, Inc., these companies willing, at all locations where notices to their respective employees are customarily posted.

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

BY THE COURT

WILLIAM H. HASTIE
Circuit Judge

Dated: May 29, 1969

APPENDIX

NOTICE TO ALL MEMBERS
PURSUANT TO

A Judgment of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended we hereby notify you that:

Appendix D

WE WILL NOT induce or encourage any individual employed by WHITE CONSTRUCTION COMPANY, CHICAGO BRIDGE & IRON CO., POIRIER & MCLANE CORPORATION, or any other employer, to engage in a strike or a refusal in the course of his employment to perform any services; or threaten, coerce, or restrain the above-named companies, and BURNS & ROE, INC., or any other employer, where an object in either case is to force or require WHITE CONSTRUCTION COMPANY, or any other employer engaged on the Oyster Creek, New Jersey project, to assign any work to employees represented by LOCAL No. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, rather than to employees represented by another labor organization, except insofar as any such action is lawful under Section 8(b)(4)(D) of the Act, and except insofar as such action is aimed at enforcement of decision of the National Joint Board for Settlement of Jurisdictional Disputes.

LOCAL No. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the day of posting, and must not be altered, defaced, or covered by any other material.

If members have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut & Juniper Streets, Philadelphia, Pennsylvania, 19107 (Tel. No. 597-7601).

APPENDIX E

Petition for Rehearing, and Suggestion for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,180

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondent,

and

BURNS AND ROE, INC., AND WHITE CONSTRUCTION COMPANY,
Intervenors.

The National Labor Relations Board respectfully petitions the Court to grant rehearing, and suggests rehearing in banc, of the decision entered in this case on April 25, 1969, by a panel of the Court (Chief Judge Hastie and Judge Kalodner), insofar as it rejects the Board's finding that the Union violated Section 8(b)(4)(B) of the National Labor Relations Act. We submit that the panel decision in this regard is erroneous, and contrary to the principles applied by this and other courts of appeals.

1. In furtherance of its effort to force White to employ additional members of respondent Local 825 rather than

members of the Ironworkers' Union, Local 825 not only caused a work stoppage of the two White employees who were members of Local 825 (action which the Board found, and the Court agreed, violated Section 8(b)(4)(D) of the Act), but it also exerted coercive pressure against general contractor Burns and subcontractors Chicago Bridge and Poirier—neutral, secondary employers. The Board found that the latter action was violative of Section 8(b)(4)(B) of the Act[1] even though in terms at least, it sought something less than a total cancellation of the business relationship with White, *i.e.*, the neutral employers were required only to induce White to displace its ironworker employees with members of Local 825. 162 NLRB 1617, 1620-1622 (1967). The Court declined to sustain the 8(b)(4)(B) finding on the ground that (slip op., p. 7):

> The language of Section 8(b)(4)(B) is apt to prohibit the classical secondary boycott where the attempt is made to coerce the primary employer by compelling others to stop trading or otherwise dealing with him. But we think the "cease doing business" language is not apt to cover the objective proved here, however, objectionable or deserving of condemnation it may be. . . .

---

[1] Section 8(b)(4)(B) makes it an unfair labor practice for a union to exert strike or other coercive pressure on a neutral secondary employer, for an object of:

> . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .

2. Congress' objective, in enacting Section 8(b)(4)(B) (formerly Section 8(b)(4)(A)) was to restrict the area of industrial conflict by shielding "unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 692 (1951). This purpose is substantially impaired by interpreting the "cease doing business" language, which defines the object proscribed by that section (n. 1, *supra*), in the narrow and literal manner utilized by the Court. For, in many secondary boycott situations, the offending union's preferred objective is not to force an actual or total cessation of business, but rather to compel the primary employer, through pressure exerted on neutral employers, merely to change his method of doing business so as to satisfy the union's demands; only if the primary employer refuses to yield, is the union's purpose aided by the removal of the primary employer entirely.

The language of Section 8(b)(4)(B) can reasonably be interpreted so as to close this "loophole." As the Board explained in *Local 3, Int'l Bro. of Electrical Workers*, 140 NLRB 729, 731 (1963), which involved a situation analogous to that here:

> While it does not appear that Respondent explicitly demanded that the Company cancel the Delee contract if Delee refused to use its members, this was the only alternative the Company had if Delee continued to refuse replacement of its employees by members of Respondent. . . . [Moreover,] [e]ven assuming, *arguendo*, that Respondent did not consciously contemplate imposition of this sanction, it is nonetheless clear that Respondent sought by its threat to require that the Company superimpose upon its existing agreement with Delee

an added condition of performance, that the work had to be done by Respondent's members. Acceptance of this condition by Delee would require the Company to cease doing business with Delee on the basis of their original arrangement. . . .

3. Accordingly, where, as here, the union's basic objective is not to force a total cessation of business relations, but merely to alter the conditions under which the business relation was first entered into, the courts of appeals have consistently sustained the Board's finding of a Section 8(b)(4)(B) violation. See, *e.g.*, *N.L.R.B.* v. *Carpenters District Council*, 407 F. 2d 804, 806 (C.A. 5, 1969); *N.L.R.B.* v. *Milk Wagon Drivers' Union, Local 753*, 335 F. 2d 326, 328 (C.A. 7, 1964); *N.L.R.B.* v. *Local 3, Int'l Bro. of Electrical Workers*, 325 F. 2d 561 (C.A. 2, 1963), enforcing, 140 NLRB 729 (1963); *Retail Fruit and Vegetable Clerks, Union Local 1017* v. *N.L.R.B.*, 249 F. 2d 591, 595 (C.A. 9, 1957). See also *Alpert* v. *Local 1066, Int'l Longshoremen's Assoc.*, 166 F. Supp. 22, 25 (D. Mass., 1958), Aldrich, J.

This Court, too, has sustained similar Board findings. *N.L.R.B.* v. *Int'l Longshoremen's Assoc.*, 331 F. 2d 712, 716-717 (C.A. 3, 1964); *N.L.R.B.* v. *Local 1291, Int'l Longshoremen's Assoc.*, 332 F. 2d 559 (C.A. 3, 1964), enforcing, 142 NLRB 257, 260-261 (1963). Particularly significant is the Court's ruling in *A. Duie Pyle, Inc.* v. *N.L.R.B.*, 383 F. 2d 773, 775 (C.A. 3, 1967), which, although it arose under Section 8(e) of the Act, is equally relevant for Section 8(b)(4)(B):[2]

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[2] The Supreme Court, in *National Woodwork Mfrs. Assoc.* v. *N.L.R.B.*, 386 U.S. 612 (1967), made plain that the two provisions were intended to complement each other and are thus to be read together.

Appendix E

> At the threshold of our inquiry is the question whether the agreement requires a cessation of business with the owner-operators and fleet-owners since by its terms it would permit them to retain the work if they became employees of the carrier and joined the union. The requirement that the owner-operators and fleet-owners must become employees of the carriers prohibits a carrier by implication from doing business with those who do not become its employees and thus requires it "to cease doing business" within the meaning of § 8(e). [Citing, *inter alia*, the Board decision in the instant case, see n. 9.]. . . . While it is true that not every incidental alteration in the relationship between the parties to the subcontract would rise to the extent of constituting an agreement to cease doing business, the provisions before us are so drastic in their impact on the continued relationship of the independent subcontractors with the carriers that they fall clearly within the area regulated by § 8(e) [citing *Local 3, supra*].

So here, the Union's demand that White hire additional members of Local 825, though perhaps less dramatic, nonetheless required such a substantial alteration in the original terms of his business relation with Burns and the other neutral employers as to "fall clearly within the area regulated by" Section 8(b)(4)(B).[3]

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[3] *N.L.R.B.* v. *Local 825, Operating Engineers*, 326 F. 2d 213 (C.A. 3, 1964), relied on by the panel (slip op., pp. 6-7) is of questionable validity, since it antedates the other decisions of the Court cited above, including *A. Duie Pyle*. Moreover, the thrust of the Court's holding in the earlier *Local 825* case was that there was insufficient evidentiary support for the Board's finding that the union had engaged in acts of coercion; there is ample support for such a finding here.

Appendix E

CONCLUSION

For these reasons, the case should be reheard, either by the panel or in banc, and, after such rehearing, a decree should be entered enforcing the Board's order in full.

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May 1969

APPENDIX F

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,180

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL NO. 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondent,

BURNS AND ROE, INC., AND WHITE CONSTRUCTION COMPANY,
Intervenors.

SUR PETITION FOR REHEARING

Present:

HASTIE, CHIEF JUDGE, and KALODNER, FREEDMAN, SEITZ, ALDISERT and STAHL, CIRCUIT JUDGES

The petition for rehearing filed by National Labor Relations Board, Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(Sgd) WILLIAM H. HASTIE
Chief Judge

Dated: June 12, 1969

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 26 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1969

No. ~~657~~ 40

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN SUPPORT OF PETITION FOR BURNS AND ROE, INC. AND WHITE CONSTRUCTION COMPANY

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FRANCIS A. MASTRO,
On the Brief.

IN THE

Supreme Court of the United States

OCTOBER TERM—1969

No. 557

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN SUPPORT OF PETITION FOR BURNS AND ROE, INC. AND WHITE CONSTRUCTION COMPANY

Statement

This case arises from proceedings in the Third Circuit, Case No. 17,180, on petition of the National Labor Relations Board (hereinafter called N.L.R.B.) for enforcement of a Cease and Desist Order against Local 825, Interna-

tional Union of Operating Engineers, AFL-CIO, in which respondents Burns and Roe, Inc. and White Construction Company (hereinafter called Respondents) participated as Intervenors, being the charging parties in the proceedings before the N.L.R.B.

The Solicitor General on behalf of the National Labor Relations Board has petitioned for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in Case No. 17,180 insofar as it denies enforcement of the Section 8(b)(4)(B) portion of the Board's order.

The Respondents herein have likewise petitioned for a Writ of Certiorari as to said Case No. 17,180 which Petition was filed on September 10, 1969 under Docket No. 570.

The Petitions of the Board and the Respondents pose essentially the same question, and as stated above arise from the same judgment of the Third Circuit.

Reasons for Granting the Writ

Respondents, for the reasons expressed in their Petition in Docket No. 570 and for those asserted by the N.L.R.B. herein, urge the Court in the exercise of its judicial discretion to consider jointly and grant both Petitions. They raise a question of great and recurring significance in the interpretation of the National Labor Relations Act which, in view of the stated conflict among Circuits, must be resolved in order to assure national uniformity in labor relations under the Act.

CONCLUSONS

For the reasons stated, the Petitions for Writs of Certiorari filed by the N.L.R.B. herein and by Respondents in Docket No. 570 should both be granted.

Respectfully submitted,

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Attorneys for Respondents Burns and Roe, Inc. and White Construction Company,
By VINCENT J. APRUZZESE,
A Partner.